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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000851-WC

JJ'S SMOKE SHOP, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-81735

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

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: JJ's Smoke Shop ("JJ's") petitions for review of the Workers' Compensation Board ("Board") opinion which affirmed an opinion of an Administrative Law Judge ("ALJ") awarding death benefits to Mary Jo Walker, administratrix of the Estate of Joshua Pendleton ("the Estate"), and to Priscilla Pendleton, the decedent's widow, and Jayden Pendleton, the decedent's daughter. For the following reasons, we affirm.

On July 22, 2009, shortly after 10 p.m., Joshua Pendleton was found murdered in the bathroom of JJ's, his place of employment. His shift had ended at 8:30 p.m. that night; at approximately 8:40 p.m. he locked the door to the store, set the security alarm, and voluntarily left the premises. Pendleton was later picked up at his house by Andrew and Samuel Marra under the pretext of going to purchase drugs. Andrew called Pendleton on the way to pick him up; Andrew told Pendleton that he had left his wallet in JJ's earlier that day.

Upon entering the Marras' car with JJ's store keys in hand, Pendleton was tasered with an electric stun gun and held hostage at knifepoint. The Marra brothers told him they were going to rob JJ's. Pendleton agreed to be compliant and begged them to return him home safely to his family after the robbery. Upon arriving at JJ's, Pendleton unlocked the store door, disabled the alarm, and entered the code to the safe. The Marra brothers proceeded to rob the store. During the robbery, Andrew Marra forced Pendleton into the store bathroom, where he stabbed him sixty-eight times. The Marra brothers then fled the scene.

Shortly after 10 p.m., the alarm company telephoned the owner of JJ's, John Blakeman, to alert him that the store alarm had been disabled. Blakeman then called a friend of his to go to the store with him to investigate. Upon realizing that the store had been robbed, the police were called, and Pendleton's body was found in the bathroom. The next day, the Marra brothers were taken into custody and later pled guilty to murdering Pendleton.

The Estate, Pendleton's widow and daughter filed a claim for death benefits alleging that Pendleton had been killed during the course and scope of his employment with JJ's. JJ's denied the claim on the basis that Pendleton's death was not work related. The matter came before the ALJ for adjudication.

The ALJ found that the Estate had provided prima facie evidence that Pendleton was murdered in the course and scope of his employment. Accordingly, the ALJ applied the presumption set forth in KRS¹ 342.680, which provides:

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[.] . . .

KRS 342.680 is read to create "a rebuttable presumption of causation in instances where a worker is incapable of explaining how a workplace injury occurred." *AK Steel Corp. v. Adkins*, 253 S.W.3d 59, 63-64 (Ky. 2008).

¹ Kentucky Revised Statutes.

Here, the ALJ found that JJ's is a business prone to robbery and burglary and that a direct relationship existed between Pendleton's knowledge and capability of accessing the store and his murder. Specifically, the ALJ found:

Although [Pendleton] voluntarily got into the motor vehicle after his usual work hours, it was probably under a false pretext. Because he was murdered, Joshua Pendleton was unable to testify. It is highly unlikely that he volunteered to be murdered as a part of a scheme to rob the smoke shop. The owner of the smoke shop testified that he did not believe that [Pendleton] was involved in a plot to rob the store. I do not believe that that has been established either. I find that he was not a participant in the burglary.

The employer asserts that he left the course and scope of his employment after he closed up the shop. I agree. But he was later forced back into his role as an employee when he was either duped or forced into reopening the shop and turning off the alarm.

.....

I believe that the perpetrators of the murder knew that Joshua Pendleton could get them into the store and disable the alarm. In the course of perpetrating the burglary, they decided to kill Joshua Pendleton. There is a direct relationship between Mr. Pendleton's knowledge and capability of getting into the store and his murder. The case is compensable.

JJ's presented the theory that Andrew Marra murdered Pendleton due to jealousy relating to a relationship between Pendleton and Andrew's girlfriend and former employee of JJ's. While Andrew testified that he killed Pendleton out of jealousy, the record shows that Andrew's testimony was unclear and inconsistent. In assessing the evidence, the ALJ gave Andrew's testimony little weight. The

ALJ also gave little weight to Samuel’s testimony, due to his status as a juvenile and felon, but found portions of his testimony reliable. Ultimately, the ALJ determined that the evidence presented by JJ’s was mere speculation and did not amount to substantial evidence to rebut the presumption contained in KRS 342.680. The ALJ concluded that the case was compensable. JJ’s filed a petition for reconsideration, which the ALJ denied. JJ’s then appealed the ALJ’s decision to the Board, which affirmed. The Board found no error in the ALJ’s determination that the rebuttable presumption in KRS 342.680 applied and that JJ’s failed to present substantial evidence to rebut the presumption. This petition for review of the Board decision followed.

The standard for reviewing a decision of the Board “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.” *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). The ALJ is the finder of fact and “has the sole authority to determine the quality, character, and substance of the evidence.” *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993) (citation omitted). We review the ALJ’s findings of fact under a clearly erroneous standard of review. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

JJ’s first claims that the ALJ failed to make correct or sufficient findings of fact. We disagree.

With respect to whether an ALJ's findings are adequate, the Kentucky Supreme Court has held:

. . . KRS 342.275(2) presently requires the award, order, or decision in a workers' compensation claim to be accompanied by "a statement of the findings of fact, rulings of law, and any other matters pertinent to the question at issue."

. . . 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 manner contemplated by KRS 342.285(2) whether the finding is supported by substantial evidence and reasonable.

Arnold v. Toyota Motor Mfg., 375 S.W.3d 56, 61-62 (Ky. 2012) (internal citations omitted).

Here, the ALJ's findings were sufficient to support the award. The record shows that the ALJ relied on Samuel's recorded statements in finding that Pendleton was murdered during the course of the robbery. The ALJ set forth a summary of events which he believed were based on the credible evidence in the record. The ALJ's summary of those events is supported by Samuel's recorded statements. The ALJ need not reiterate in the opinion, in detail, the exact statements of Samuel from which he formulated his opinions. Thus, the ALJ's findings as to what took place on the day in question are not clearly erroneous and will not be disturbed.

JJ's also contends that the ALJ's finding that JJ's is a business more prone to robbery and burglary than ordinary retail businesses is unsupported by the record. We disagree.

The ALJ has the discretion to draw reasonable inferences from the evidence. *Jackson v. General Refractories Co.*, 581 S.W.2d 10 (Ky. 1979); *Hallis Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327 (Ky. App. 2000). In this case, the record shows that JJ's has an alarm system and that Blakeman, the store owner, directed his employees how to proceed in the event of robbery. In fact, Blakeman testified that he does not schedule female employees to work the night shift because he does not want them working there at night. He further testified that he has always been paranoid of a robbery at JJ's. Based on this evidence, the ALJ could reasonably infer that JJ's is a business more susceptible to robbery than ordinary retail businesses.

Regardless, we do not believe this inference has any significant bearing on whether Pendleton was murdered during the course and scope of the robbery. In Kentucky, "compensation will be granted for injuries . . . when they are fairly traceable to an incident of the employment, and will be denied where they are the result of personal grievances not connected in any way [] with the employment." *Henry Vogt Mach. Co. v. Chamberlain*, 279 S.W.2d 224, 226 (Ky. 1955). Here, the evidence shows that because of Pendleton's employment and access to the security system at JJ's, the Marra brothers lured him into their car under the pretext of purchasing drugs, forced him to disable the alarm and open the store doors and

safe, and then murdered him on his work premises. This evidence is sufficient to establish a causal connection between Pendleton's employment and his death, irrespective of whether JJ's is a business more prone to robbery than ordinary retail businesses. Accordingly, even if the ALJ's finding was unsupported by the record, any error which may have occurred was harmless.

Next, JJ's claims that the ALJ erred by concluding that Pendleton's death arose out of and in the course of his employment. We disagree.

JJ's argues that the ALJ never moved past the presumption in KRS 342.680 to address the substantial evidence it presented showing that Pendleton's death was not work related. JJ's maintains that the ALJ effectively converted a rebuttable presumption into an irrebuttable one.

The procedural effect of the presumption contained in KRS 342.680

is to shift to the employer the burden of going forward with substantial evidence that the injury or death was not work-related; however, the burden of proving causation remains on the claimant. If the employer fails to meet its burden, the claimant is entitled to the presumption and prevails on the issue of causation. If the employer does meet its burden, the claimant is not entitled to the presumption and must go forward with evidence that is persuasive enough to convince the ALJ that the injury or death was work-related.

Williams v. White Castle Sys., Inc., 173 S.W.3d 231, 235 (Ky. 2005) (internal citations omitted).

Regarding the shifting of the burden of proof when there is a rebuttable presumption:

A rebuttable presumption shifts to the party against whom it is directed the burden of going forward with evidence to rebut or meet it but does not shift the burden of proof (i.e., the risk of nonpersuasion) from the party upon whom the burden was originally cast. If the presumption is not rebutted, the party with the burden of proof prevails on that issue by virtue of the presumption. If the presumption is rebutted, it is reduced to a permissible inference. The ALJ must then weigh the conflicting evidence and decide which is most persuasive.

AK Steel Corp., 253 S.W.3d at 63-64.

JJ's maintains that it presented substantial evidence that Andrew murdered Pendleton because of a personal vendetta; chiefly, Andrew's testimony, albeit inconsistent, that he had a bisexual relationship with his girlfriend and Pendleton and killed Pendleton in a fit of jealousy. JJ's points to the police investigation records containing an interview with a man who had known Andrew for about nine months, and who stated that he heard Andrew say that Pendleton was hitting on his girlfriend and that he should go up there and "whip his ass." The police records also contain a statement from Andrew's older brother who described previous events in which Andrew had engaged in a confrontation with their sister's boyfriend, had abandoned a prior girlfriend who had his child, and had bragged about killing a couple in Georgia or Alabama. JJ's argues that the evidence shows that Andrew was intensely jealous of Pendleton's association with his girlfriend and that when Andrew is jealous of another man, he can become quite violent. JJ's avers the fact that Andrew stabbed Pendleton sixty-eight times reflects this jealous rage.

JJ's also emphasizes that Pendleton violated specific orders from his employer not to return to the store without first calling Blakeman. JJ's asserts that Pendleton was aware before he entered the Marra brothers' car that Andrew wished to return to the store to retrieve his wallet and that despite this knowledge, Pendleton failed to call Blakeman. JJ's contends that Pendleton's death arose out of his intent to locate and purchase drugs and that but for his voluntary act of entering the Marra brothers' car for this purpose he might still be alive today. JJ's asserts that the ALJ erred by not finding that it had presented substantial evidence to rebut the presumption that Pendleton's death was work related.

However, the record shows that the ALJ considered the evidence presented and found that JJ's theories were based on innuendo and speculation, not substantial evidence, and that it failed to rebut the presumption contained in KRS 342.680. Specifically, the ALJ found Andrew's testimony regarding his jealous feelings toward Pendleton to be without credibility; Andrew repeatedly lied to investigators and his testimony was unclear and inconsistent. We agree. We further agree with the ALJ's finding that Blakeman's testimony and speculations were not substantial evidence to rebut the presumption.

Finally, JJ's contention that Pendleton violated store policy by returning to the store without first calling Blakeman is not determinative of whether the presumption in KRS 342.680 was rebutted. We do not have insight into whether Pendleton planned to call Blakeman after entering the car with the Marra brothers; the record shows that Pendleton did not know before entering the car that he was

entering a dangerous situation that would prevent him from making a phone call.

Upon extensive review of the record, we are unable to say that the ALJ erred by finding that JJ's failed to present substantial evidence to rebut the presumption set forth in KRS 342.680.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Denis S. Kline
Louisville, Kentucky

BRIEF FOR APPELLEES

ESTATE OF JOSHUA
PENDELTON, PRISCILLA
PENDLETON, AND JADEYN
PENDELTON:

Timothy R. McCarthy
Louisville, Kentucky