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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001277-WC

R & T ACOUSTICS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-15-00236

BERNABE AGUIRRE;
NATIONAL DRYWALL, LLC;
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** ** *

BEFORE: DIXON, GOODWINE, AND MAZE, JUDGES.

DIXON, JUDGE: Appellant, R & T Acoustics ("RTA"), petitions for review of an opinion of the Workers' Compensation Board reversing and remanding the

Administrative Law Judge's order dismissing Bernabe Aguirre's claim for benefits. Finding no error, we affirm.

On December 18, 2014, Aguirre was injured after falling from a ladder while working for National Drywall, LLC, on the construction of an H.H. Gregg store. Aguirre received medical treatment at an urgent care center for fractures to his ankle and foot. During his treatment at urgent care, Aguirre submitted a urine sample for a drug screen, which resulted in a positive cocaine metabolite test. Aguirre filed a claim for workers' compensation benefits, and RTA was ultimately determined to be the up-the-ladder employer of National Drywall. RTA raised the affirmative defense of voluntary intoxication pursuant to the version of KRS 342.610(3)¹ then in effect, which stated: "Liability for compensation shall not apply where injury . . . to the employee was proximately caused primarily by voluntary intoxication as defined in KRS 501.010[.]"

Aguirre testified, using an interpreter, by deposition and at the final hearing before the ALJ. Regarding his injury, Aguirre explained he was on the roof of the building to repair the store's sign, and he used an extension ladder to climb approximately fifteen feet from the roof to the sign. According to Aguirre,

¹ An amended version of KRS 342.610, effective July 14, 2018, provides: "If an employee voluntarily introduced an illegal, nonprescribed substance . . . into his or her body detected in the blood, as measured by a scientifically reliable test, that could cause a disturbance of mental or physical capacities, it shall be presumed that the illegal, nonprescribed substance . . . caused the injury" KRS 342.610(4).

as he started working on the sign, the ladder “slipped,” causing him to fall. As he fell, Aguirre’s foot caught one of the rungs of the ladder, and he landed on the roof. Aguirre asserted none of his coworkers witnessed the accident, and he refused to answer questions regarding his use of cocaine. Aguirre also submitted the IME report of Dr. Jules Barefoot. Dr. Barefoot diagnosed Aguirre with multiple fractures of the ankle and foot due to the work accident and assessed a 7% impairment rating.

RTA filed the medical records from Norton Healthcare detailing Aguirre’s urgent care visit. He was prescribed Ultram for pain and fitted with an air cast and crutches. The lab report of the urinalysis indicated a positive result for cocaine, with a screening cutoff of 300ng/ML and a confirmation cutoff of 150ng/ML. RTA also submitted the IME report of Dr. Richard Sheridan, an orthopedic surgeon, who assessed a 7% whole person impairment for Aguirre’s ankle and foot injuries resulting from the work accident. On the issue of intoxication, Dr. Sheridan opined:

From a medical standpoint, the presence of cocaine in Mr. Aguirre’s body could undermine his ability to perform his work duties safely. The presence of cocaine in the quantities documented could have been a significant contributing factor in his injury. It could have caused his injury to be worse than if he had not been impaired.

Additionally, RTA submitted the report of Dr. Saeed A. Jortani, a clinical chemist and forensic toxicologist. Dr. Jortani conducted a review of Aguirre's medical records, deposition testimony, and textbooks relating to the effects of cocaine. On the issue of intoxication and Aguirre's work accident, Dr. Jortani opined:

. . . [T]here is no information on the last time he ingested cocaine nor is it known whether he is a frequent abuser of cocaine or he uses it sporadically and occasionally. Since we do not have a blood test for cocaine and its metabolite testing, it is not feasible to establish whether the positive test was due to a recent ingestion or use of cocaine the day before!

. . .

Keeping in mind the result of the testing of his urine on the sample collected at the Norton Care Center, it is my opinion with reasonable scientific probability that he was more likely than not an active user of cocaine. What is not clear here is the time of last ingestion as well as the frequency of abuse. If we had these two pieces of information, it would be feasible to establish whether the voluntary ingestion of cocaine as demonstrated by the urine positive test result was the proximate cause of the injury as the result of his fall on December 18, 2014. Not having the information, we can only conclude that by ingesting cocaine at some point during the period of 1-24 hours prior to testing, Mr. Aguirre put himself at greater risk of falling while being on the top of the ladder and the resulting fall and injuries.

The ALJ rendered an opinion on August 22, 2016, dismissing the claim. The ALJ relied on the positive drug screen and the opinions of Drs. Sheridan and Jortani to conclude that the work injury was caused by Aguirre's

voluntary cocaine intoxication. Neither party filed a petition for reconsideration, and Aguirre appealed to the Board. The Board issued an opinion vacating and remanding the claim based on its determination that the opinions of Drs. Sheridan and Jortani were insufficient to support the ALJ's finding of voluntary intoxication. The Board stated, in part:

As a matter of law, the opinions of Drs. Jortani and Sheridan do not meet the standard of proof for the affirmative defense set forth in KRS 342.610(3). Pursuant to this statute, the ALJ *must* find that the proximate cause 'primarily' leading to Aguirre's accident was his cocaine use utilizing the medical evidence in the record. . . . A mere statement by the ALJ that she relied upon the opinions of Drs. Jortani and Sheridan to conclude the cocaine in Aguirre's system caused his work accident is insufficient in light of the fact that neither doctor definitively made such a statement. Thus, the ALJ's decision must be vacated and the claim remanded for a determination of whether the opinions of Drs. Jortani and Sheridan, in concert with other evidence in the record, satisfy the standard set forth in KRS 342.610(3).

The ALJ thereafter issued an opinion and order on remand dismissing Aguirre's claim, again concluding voluntary intoxication caused his injury. The ALJ relied on the opinions of Drs. Jortani and Sheridan, the positive drug screen, and Aguirre's testimony. The ALJ essentially concluded Aguirre failed to explain why the ladder "slipped", specifically noting Aguirre did not testify as to the weather conditions, the condition of the ladder, or the condition of the roof. Aguirre filed a petition for reconsideration, which was overruled by the ALJ.

Aguirre then appealed to the Board, arguing that the ALJ's decision was not supported by substantial evidence. The Board again issued an opinion reversing the ALJ and remanded the matter a second time to the ALJ for resolution of the merits of the remaining contested issues. The Board concluded that the additional findings made by the ALJ were merely suppositions which were not supported by evidence in the record.

In its petition for appellate review, RTA argues that the ALJ made impermissible inferences based on the evidence, and it contends the Board exceeded its authority by substituting its judgment for that of the ALJ.

As the employer, it was RTA's burden to prove the affirmative defense of intoxication. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). Where, as here, the party with the burden of proof was successful before the ALJ, the question on appeal to the Board is whether the ALJ's decision was supported by substantial evidence. *Id.* "Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B. F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971). When this Court reviews the Board's decision, our function is to correct the Board only where we believe it "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing

the evidence so flagrant as to cause gross injustice.” *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

“The special defense provided by KRS 342.610(3) encompasses situations including horseplay, intoxication, or other employee conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or to another.” *Advance Aluminum Co. v. Leslie*, 869 S.W.2d 39, 40 (Ky. 1994). The version of KRS 342.610(3) in effect at the time of Aguirre’s injury provides: “Liability for compensation shall not apply where injury . . . to the employee was proximately caused primarily by voluntary intoxication as defined in KRS 501.010[.]” “‘Voluntary intoxication’ means intoxication caused by substances which the defendant knowingly introduces into his body, the tendency of which [is] to cause intoxication he knows or ought to know . . . [.]” KRS 501.010(4). “‘Intoxication’ means a disturbance of mental or physical capacities resulting from the introduction of substances into the body.” KRS 501.010(2).

To sustain its burden of proving Aguirre’s injury was proximately caused primarily by voluntary intoxication, RTA submitted the urgent care records showing the positive drug screen result and the expert opinions of Drs. Jortani and Sheridan. Dr. Jortani was unable to state that ingesting cocaine was the proximate cause of Aguirre’s injury; instead, he concluded that “by ingesting cocaine at some

point during the period of 1-24 hours prior to testing, Mr. Aguirre put himself at greater risk of falling . . . [.]” Dr. Sheridan opined the cocaine ingested by Aguirre “could have been a significant contributing factor” to the injury. Aguirre, who does not speak English, testified through an interpreter. Aguirre unequivocally asserted he climbed fifteen feet and started working on the sign when the extension ladder “slipped” and caused him to fall. As he fell, his foot caught on one of the rungs of the ladder, and he landed on the roof.

The Board thoroughly analyzed the ALJ’s findings and concluded, in relevant part:

We determine the ALJ failed to identify additional evidence in the record, as directed by this Board, to establish he was intoxicated at the time of his accident and the intoxication was the proximate cause ‘primarily’ leading to his injury pursuant to KRS 342.610(3). The Board previously held that as a matter of law, the opinions of Drs. Jortani and Sheridan alone do not meet the standard of proof for the affirmative defense set forth in KRS 342.610(3). The Board vacated the ALJ’s decision and remanded the claim for a determination of whether the opinions of Drs. Jortani and Sheridan, in concert with other evidence in the record, satisfy the standard set forth in KRS 342.610(3). In concert with the opinions of Drs. Jortani and Sheridan, the ALJ cited to the following in finding Aguirre’s voluntary intoxication of cocaine was a primary cause in the December 18, 2014 work accident: the lack of explanation as to why a non-deficient ladder, under normal weather conditions would slip; no indication in Aguirre’s testimony that the grade of the roof he was working on made it difficult for him to secure the ladder; no indication the ladder was unsteady or wobbly as he climbed the rungs; and the lack of

evidence suggesting the climate was icy or raining on the day of the accident. The ALJ found the absence of other factors present to explain why Aguirre slipped as he climbed the rungs, in conjunction with Drs. Jortani and Sheridan's opinions, persuasive in concluding his voluntary ingestion of cocaine and resultant intoxication was a primary cause of the December 18, 2014 accident. These observations by the ALJ are mere suppositions which are not supported by the evidence.

...

[N]o evidence was introduced establishing the condition of or possible deficiencies with the ladder, the condition or grade of the roof on which the ladder [was] placed or the weather from the day of the accident. The ALJ's determination that the lack of evidence on these issues supports the conclusion Aguirre's voluntary ingestion of cocaine was a primary cause of the December 18, 2014 accident is speculative at best and fails to rise to the level of proof necessary to establish causation in the affirmative defense of voluntary intoxication. The burden was on R & T Acoustics to affirmatively introduce evidence of these additional factors cited by the ALJ, and it failed to do so.

The Board determined that RTA was not entitled to the affirmative defense because it failed to produce substantial evidence that Aguirre's injury was proximately caused primarily by voluntary intoxication. We have carefully reviewed the record and cannot conclude that the Board "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp.*, 827 S.W.2d at 687-88. RTA has failed to point to Board error sufficient to require reversal as necessitated by the standard on appeal.

Finally, RTA cites *Woosley v. Central Uniform Rental*, 463 S.W.2d 345, 346 (Ky. 1971), which addressed an earlier version of the intoxication defense, KRS 342.015(3), and held the statute precluded benefits if the injury would not have occurred but for the employee's intoxication. *Id.* at 347. RTA contends Aguirre offered no other explanation for his injury to rebut the evidence of intoxication; accordingly, the ALJ was free to infer the injury was caused by intoxication.

We disagree and find RTA's reliance on *Woosley* misplaced. In *Campbell v. City of Booneville*, 85 S.W.3d 603, 606 (Ky. 2002), the Court explained the legislature chose to change the standard enunciated in *Woosley* by repealing KRS 342.015(3) in 1972 and replacing it with KRS 342.610(3). The Court advised, "KRS 342.610(3) clearly indicates that the defense is available if a worker's voluntary intoxication was the primary cause of an injury." *Id.* Despite RTA's argument to the contrary, *Woosley* is inapplicable, and the Board properly applied KRS 342.610(3) to conclude that the Board's order reversing the ALJ is supported by substantial evidence in the record.

For the reasons stated herein, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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