

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 31, 2015

CLAIM NO. 201187090

BRAKE PARTS

PETITIONER

VS.

APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

THERESA MIDDLETON and
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

ALVEY, Chairman. Brake Parts Inc. ("Brake Parts") appeals from the Opinion on Remand rendered March 31, 2015 by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") awarding Theresa Middleton ("Middleton") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for work-related

injuries sustained as a result of a fall from a manlift on May 6, 2011. On remand, the ALJ again determined Middleton was entitled to the thirty percent enhancement pursuant to KRS 342.165(1). Brake Parts also seeks review of the May 1, 2015 order denying its petition for reconsideration.

The sole issue on appeal is whether the ALJ erred in assessing a safety penalty against Brake Parts pursuant to KRS 342.165(1). Therefore, the majority of the medical evidence will not be discussed since it is not relevant to this appeal. Because substantial evidence supports the ALJ's determination of the applicability of KRS 342.165(1), we affirm.

Middleton filed a Form 101 alleging multiple injuries when she stepped backward and fell approximately four feet off of a manlift while stacking parts. This Board previously summarized the relevant facts of this claim in its January 30, 2015 Opinion Vacating in Part and Remanding, stating as follows:

Middleton testified by deposition on March 8, 2013, and at the hearing held June 13, 2014. Middleton began working for Brake Parts in 2001 initially packaging finished brakes. She was later transferred to the lab which involved inspecting parts. She was subsequently transferred to the lean cell department which involved the manufacture of brake parts. She was initially a leader in that department,

then became a machine operator. After two to three years in the lean cell department, Middleton was transferred to the logo room where the names or logos for different companies were affixed to the parts. On the day of the accident, Middleton had been detailed away from her usual job to the bulk, or storage area, where she had only worked on a few previous occasions. The storage area is where the parts and supplies necessary for the manufacturing process were stored and dispensed.

On the date of the accident, Middleton was using a manlift to stack parts on a shelf. She stated she had operated the lift a few times prior to the accident, and had received very little training. On the first day she worked in the bulk area she was shown the key to the manlift, how to charge the battery, where everything plugged in, and how to use the joystick. At the time of the accident, she had stacked some supplies on a shelf, and was returning to ground level. As the lift was descending, it stopped. She believed she was at ground level and stepped backward. Unbeknownst to her at the time, she estimated the lift was still four to five feet from ground level, and she fell backward onto the concrete floor. She stated she was not using a safety harness or belt, and had never been instructed to do so. She also stated no such equipment was available.

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Jeff Martin ("Martin"), the Environmental Health and Safety Engineer for Brake Parts, testified by deposition on September 18, 2013. Martin has a bachelor's degree in Industrial Technology from Morehead

State University. Martin personally investigated the accident, and reviewed the scene of the accident. At the time of the accident, Middleton was operating a JLG lift, also known as a personal manlift or personal order selector. He stated a harness is not required unless working above the six foot level. He estimated the platform was three to three and a half feet above floor level when Middleton fell. He stated there were no witnesses to the fall. Martin was unaware of any actual training Middleton received except for what she testified to in her deposition. He stated despite JLG's requirement for the use of a lanyard, noted in the operator's manual, the use of a fall restraint system was not used on the machine because it was not required by OSHA. He noted there were no training videos for the use of the machine at the time Middleton was injured. He stated there was no OSHA investigation of the accident, and no citations were issued.

James Randolph Gray ("Gray"), president and owner of Grayhawk Safety and Consulting from Benton, Kentucky, testified by deposition on December 4, 2013. Gray holds a bachelor's degree from Murray State University in occupational safety and health. Gray worked as an inspector for OSHA for twenty-five years, retiring in December 2008. He occasionally conducts OSHA training nationwide.

Based upon his review, Gray stated Brake Parts breached its statutory duty to provide adequate training. He stated no records exist evidencing Middleton received the training necessary to operate the equipment. He stated the initial training must be provided by someone who is competent in

understanding the equipment. Upon completion of the training, the employer is required to provide an operator card. He also stated there is no evidence Brake Parts complied with a maintenance program.

According to Gray, Middleton should have been wearing fall protection when working. While fall protection is required while working at or above six feet in a construction setting, in an industrial setting it is required when working at a height of greater than four feet pursuant to 29 CFR 1910.178. He also noted the manufacturer required the use of a lanyard as stated in the operator's manual. He opined the use of a lanyard would have prevented Middleton's fall.

Gray also noted the JLG machine did not have an interlock system which would have prevented the opening of the door until the platform reached the floor. He stated Brake Parts breached its duty to conduct inspections. He stated Brake Parts violated the general duty clause for not providing a safety lanyard, and specifically violated 19 CFR 1910.178 for failing to comply with the instructions in the operator's manual.

In the opinion rendered August 8, 2014, the ALJ awarded TTD benefits, PPD benefits enhanced by the three multiplier, and medical benefits. The ALJ stated as follows in finding Brake Parts committed a safety violation, and in enhancing the award by 30 percent pursuant to KRS 342.165(1):

1. Principle of law.

The goal of KRS 342.165(1) is to promote workplace safety by encouraging workers and employers to follow safety rules and regulations. *Apex Mining v. Blankenship*, 918 S.W.2d 225, 228 (Ky. 1996). The relevant portion of the statute provides:

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.

Application of the safety penalty requires the claimant to prove two elements: (1) evidence of the existence of a violation of a specific safety provision, whether state or federal; and (2) evidence of "intent" to violate a specific safety provision. *Cabinet for Workforce Development v. Cummins*, 950 S.W.2d 834 (Ky. 1997). Intent to violate a regulation, however, can be inferred from an employer's failure to comply because employers are presumed to know what state and federal regulations require. See *Chaney v. Dags Branch Coal Co.*, 244 S.W.3d 95, 101 (Ky. 2008).

KRS 338.031(1)(a), commonly known as Kentucky'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." Even a general duty violation that results in a worker's accident and injury may be sufficient to fall under KRS 342.165(1). See *Apex Mining v. Blankenship, supra*.

2. Findings of fact and conclusions of law.

Middleton is entitled to 30% enhancement of benefits pursuant to KRS 342.165(1) as the employer failed to provide a workplace free from recognized hazard. Middleton has also proven intent to violate on the part of the employer.

3. Evidentiary basis and analysis.

Brake Parts is required to provide a workplace free from recognized hazards. 29 CRF outlines the duty to provide training and the requirement of operating under direct supervision until training is completed. The formal instruction, practical training and evaluation, all must be conducted by a qualified person. The training should be documented, certification completed and the equipment inspected on a regular basis. Furthermore, fall protection should have been provided. None of this was done, as Middleton testified. Although Martin, the safety director for the company, testified Middleton would have received safety training as evidenced by logs of such training, no logs were ever produced. Martin did not believe a training program was required.

In the absence of proof of training, Middleton's testimony is the most believable. She had not been properly trained on safe operation of the

equipment as was required by the owner's manual and the federal code. Randy Gray, Plaintiff's expert, testified concerning the federal and state requirements to provide training on such a lift, requirements appearing to be fairly obvious even to a lay person.

The element of intent of noncompliance is inferred from Defendant Employer's failure to keep logs and to document training. Documented safety training is a somewhat easy preventative solution for employers in order to avoid the enhancement of benefits under the statute.

Defendant Employer's analogy to *Apex, supra*, arguing the failure to provide a lanyard was not an obvious unsafe condition is rejected and its argument of no OSHA violation is disingenuous as there was no OSHA inspection. None was required since Middleton was not hospitalized overnight.

Reviewing of [sic] the cases cited by Defendant Employer, the main argument is that in order to prove a violation of the general duty clause, intentional disregard for a safety hazard must be shown. It is the opinion herein that failure to provide training and to maintain documentation thereof demonstrates an intentional disregard for safety.

After reviewing the statutory and case law regarding the application of the safety penalty, this Board vacated in part and remanded for additional findings in its January 30, 2015 opinion, stating as follows:

Here, the ALJ's finding of a safety violation, and assessment of a safety penalty is confusing. In her decision, the ALJ clearly found Brake Parts had committed a safety violation, but the analysis blends elements of both a specific infraction of the safety regulations, and a violation of the general duty clause contained in KRS 338.031. On remand, the ALJ is directed to more clearly set forth the basis for her findings on this issue. We note evidence exists which may well support the finding of a safety violation, and the assessment of a penalty. However, the ALJ must clearly provide the basis for doing so.

In the March 31, 2015 Opinion on Remand, the ALJ provided the identical "Principle of law" and "Findings of fact and conclusions of law" language contained in the original opinion. Under her "Evidentiary basis and analysis," the ALJ reiterated much of her previous analysis, and made additional findings stating as follows:

Plaintiff further supports this position in pointing out the general duties statute requires an employer to provide its employees a place to work free from recognized hazards that can cause death or serious injury. (KRS 338.031; *Hornback v. Hardin Mem'l Hosp.*, 411 S.W.3d 220, 222 (Ky. 2013).

An Employer is determined to have violated KRS 338.031 when:

- (1)[a] condition or activity in the workplace presented a hazard to Employees;
- (2) the cited Employer or Employer's industry recognize the

hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a physical means existed to eliminate or materially reduce the hazard. *Lexington - Fayette Urban Cnty. Gov't v. Offutt*, 11 S.W.3d 598, 599 (Ky. App. 2000) (Quoting *Nelson Tree Services, Inc. v. Occupational Safety & Health Review Commission*, 60 F. 3d 1207, 1209 (6th Cir. 1995).

Randy Gray expressed his professional opinion that Defendant Employer failed to comply with its statutory duty to provide a safe and healthful workplace for its employees. Specifically, in part, Gray found:

1. Defendant breached its duty to provide training to Ms. Middleton prior to assigning her to operate a JLG MODEL 10MSP lift. According to 29 CFR 1910.178(I)(1)(i) "The employer shall ensure that each powered truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (I).

Gray went on to state that the regulations require the employer to ensure that each operator has successfully completed the training program. Paragraph 1.2 of the JLG Model operator's manual states that the Operator is to have read and understood the manual and be trained by an authorized trainer.

2. The Defendant breached its duty to provide a training program to Ms. Middleton prior to assigning her to operate at JLG MODEL 10MSP lift in the Logo room.

3. The Defendant breached its duty to provide fall protection to Ms. Middleton. The operator's manual provided by the manufacturer required the operator to use a fall restraint system while in the platform attached to a maximum 30" lanyard while attached to an authorized anchor point. Ms. Middleton never had a safety harness of any type.

Gray outlined the violations in his report and found [sic] Defendant Employer complied with the operator's manual and required the use of the lanyard, the injuries to Middleton would not have occurred.

Jeff Martin, Defendant Employer's safety director, did not believe the operator's manual requirement of a 30" lanyard was required stating OSHA does not require it.

Gray clarified the OSHA requirement. In the construction industry, Gray stated, any time an employee leaves the ground at 6 feet and higher, he is required to be tied off. However, in a factory setting, it is at 4 feet. (See also, 29 CFR 1910.178.) Mr. Gray went on to state that if it is a requirement of the manufacturer of the lift to use a 30 inch lanyard, then OSHA regulations require that the employer utilize a lanyard. Thus, it was not

correct regarding use of the lanyard on the industrial lift. Defendant Employers' own safety engineer mistakenly believed that a lanyard was not required in this instance, when in fact a lanyard was required and would have prevented the injuries to Middleton.

Plaintiff's position is fully supported on all elements of the violation of the general duty clause. The test for the violation of the general duty clause requires the following:

(1) A condition or activity in the workplace presented a hazard to Employees.

The failure to provide a lanyard meant an individual was utilizing a lift, placing them greater than 4 feet off the ground, presenting a hazard to the employees. As Gray noted, an Employer has a duty to be aware of the dangers, specifically as set forth in the operating manual to a piece of equipment.

(2) The cited Employer or Employer's industry recognized the hazard.

Gray clarified the OSHA requirements for factory settings. In a factory setting, a lanyard is required if an individual is working on a platform higher than 4 feet and if the manufacture requires the use of a lanyard. Thus, the OSHA regulations recognize such hazard, as does the manufacturer. Defendant Employer knew the lanyard was required per the owner's manual but chose to ignore the requirement.

(3) The hazard was likely to cause death or serious physical harm.

Since this industrial lift was utilized for purposes of storing inventory at

heights of 8 to 10 feet, it is patently obvious that the failure to use the fall protection could cause death or serious physical harm.

(4) A feasible means existed to eliminate or materially reduce the hazard.

The fix was relatively minor. All it took was the use of a 30" lanyard.

The Employer intentionally disregarded this safety hazard that was likely to cause serious physical harm. The Employer had actual knowledge of the manufacturer's requirement for the use of a lanyard, but ignored or disregarded that requirement.

The evidence reveals that Defendant Employer had actual knowledge of the requirement of the use of the lanyard and understood the consequences, yet nothing was done to comply with the manufacturer's required use of a lanyard.

Plaintiff is entitled to the enhancement for a safety violation per KRS 342.165(1).

In denying Brake Parts' petition for reconsideration, the ALJ provided the following additional findings:

A. That the Defendant/Employer breached a specific duty in failing to provide a training program and to provide training to Ms. Middleton prior to assigning her the job of operating a JLG MODEL 10MSP lift. The Defendant breached 29 CFR 1910178(1)1(i) "the Employer shall insure that each power truck operator is competent to operate

a power industrial truck safety, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (1)."

B. In addition, the ALJ finds that the Defendant/Employer violated the general duties clause by failing to provide the Plaintiff with fall protection as required by the operator's manual for the JLG MODEL 10MSP lift. The operator's manual specifically required the operator to use a fall restraint system while in the platform attached to a maximum 30 inch lanyard while attached to an authorized anchor point. Ms. Middleton never had a safety harness of any type.

C. The ALJ specifically reviewed the 4 prong general duty clause requirement at Pages 29 and 30 of the Opinion on Remand.

D. Plaintiff is entitled to an enhancement for a safety violation per KRS 342.165(1).

E. The Opinion on Remand dated March 31, 2015 is amended to include the additional findings set forth above. All other terms and conditions set forth in the Opinion on Remand remain as set forth therein.

On appeal, Brake Parts again challenges the ALJ's imposition of the safety violation based upon its alleged violation of the general duty clause pursuant to KRS 338.031 and specific federal regulations.

As the claimant in a workers' compensation proceeding, Middleton had the burden of proving each of the essential elements of her cause of action. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Middleton was successful in her burden, the question on appeal is whether substantial evidence existed in the record supporting the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d

479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

KRS 342.165(1), states as follows:

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.

The purpose of KRS 342.165 is to reduce the frequency of industrial accidents by penalizing those who intentionally fail to comply with known safety regulations. See Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996). The burden is on the claimant to demonstrate an employer's intentional violation of a safety statute or regulation. Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997). On the other hand, as a general rule workers' compensation acts are no fault. The purpose of workers' compensation is to pay benefits to an injured

worker without regard to negligence on the part of either the employer or the employee. See Grimes v. Goodlet and Adams, 345 S.W.2d 47 (Ky. 1961).

The application of the safety penalty requires proof of two elements. Apex Mining v. Blankenship, supra. First, the record must contain evidence of the existence of a violation of a specific safety provision, whether state or federal. Secondly, evidence of "intent" to violate a specific safety provision must also be present. Enhanced benefits do not automatically flow from a showing of a violation of a specific safety regulation followed by a compensable injury. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). The worker also has the burden to demonstrate the employer intentionally failed to comply with a specific statute or lawful regulation. Intent to violate a regulation, however, can be inferred from an employer's failure to comply because employers are presumed to know what state and federal regulations require. See Chaney v. Dags Branch Coal Co., 244 S.W.3d 95, 101 (Ky. 2008).

Violation of the "general duty" clause set out in KRS 338.031(1)(a) may well constitute grounds for assessment of a safety penalty in the absence of a specific regulation or statute addressing the matter. Apex Mining v.

Blankenship, supra; Brusman v. Newport Steel Corp., 17 S.W.3d 514 (Ky. 2000). KRS 338.031(1)(a) requires the employer "to furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm" to employees. Two cases containing court discussion of the violation of KRS 338.031(1)(a) for the purposes of KRS 342.165(1) are outlined below.

In Apex Mining v. Blankenship, supra, the injured worker was required to operate a grossly defective piece of heavy equipment which had its throttle wired open. The brakes failed to work, causing prior accidents. The Court found the egregious behavior of the employer justified imposition of the safety penalty in the absence of a specific statute or regulation.

However, in Cabinet for Workforce Development v. Cummins, supra, the Court stated not every violation of KRS 338.031(1)(a) required the imposition of a penalty for the purposes of KRS 342.165. The claimant's work site as a teacher of refrigeration, air conditioning, and heating at an adult vocational school was not properly ventilated. The Court agreed with the Board that the employer's action was not an obvious and egregious violation of basic safety concepts such as would overcome the general language of KRS

338.031. The Court distinguished the facts from Apex Mining, noting the potentially dangerous condition of the piece of heavy equipment and the fact the employer had taken no steps to correct it.

The facts in Apex Mining illustrate one end of a continuum of employer conduct that ranges from egregious to the other end of the continuum illustrated in Cummins where the employer's conduct is innocuous.

On remand, the Board directed the ALJ to clarify her analysis in assessing a safety penalty, noting she blended elements of both a specific infraction of the safety regulations and violation of the general duty clause contained in KRS 338.031. After reviewing the Opinion on Remand and Order denying Brake Parts' petition for reconsideration, we find the ALJ sufficiently remedied the original opinion, and because substantial evidence supports her assessment of the safety penalty, we affirm.

The ALJ clearly found Brake Parts violated both specific regulations contained in the Code of Federal Regulations ("CFR") pertaining to training, as well the general duty clause pursuant to KRS 338.031. In support of her determination, the ALJ found the testimony of Middleton and Randy Gray ("Gray"), as well as his November 22, 2013

investigative report, and the operator's manual most persuasive.

We will first address the ALJ's finding of a safety violation based upon a specific statute or regulation. In the May 1, 2015 Order on Petition for Reconsideration, the ALJ found Brake Parts violated 29 CFR 1910.178(l)(1)(i) which requires the Employer to ensure each operator "is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (l)."

The testimony and report of Gray, in addition to the testimony of Middleton, support the finding of the first element, i.e., the existence of a violation of a specific safety provision. As noted by the ALJ, Middleton testified she received limited training the first day. In his November 22, 2013 investigative report, Gray concluded Brake Parts, "breached its duty to provide training to Ms. Middleton prior to assigning her to operate a JLG Model 10MSP lift" as required in 29 CFR 1910.178(l)(1)(i) and (ii). Gray also found Brake Parts violated other training provisions contained in 29 CFR 1910.178. Gray testified Middleton was "totally unqualified" to be an operator of the lift given her limited training.

In addition, the JLG Operation and Safety Manual ("operator's manual") was filed by Brake Parts during the pendency of this claim. Section 1.2 requires an operator to read and understand the manual, and to be trained by authorized persons. Section 2.1 outlines what the training must cover, and includes use of the controls and safety systems; control labels, instructions and warnings on the machine; rules of the employer and government regulation; use of approved fall protection device; knowledge of sufficient mechanical operation to recognize potential malfunction; the safest means to operate when obstacles are present; means to avoid the hazards of unprotected electrical conductors; and specific job requirements. The ALJ acted well within her discretion in relying upon the testimony of Gray and Middleton, and on the operator's manual and Gray's report, rather than the testimony of Jeff Martin ("Martin"), in finding Brake Parts violated a specific federal regulations concerning training.

As noted above, Middleton bore the burden of proving Brake Parts intentionally failed to comply with the specific statute or lawful regulation. Intent to violate a regulation, however, can be inferred from an employer's failure to comply because employers are presumed to know what state and federal regulations require. See Chaney v.

Dags Branch Coal Co., 244 S.W.3d at 101. In this instance, after finding Brake Parts breached its statutory duty to provide adequate training, the ALJ addressed the element of intent which was inferred from Brake Parts' failure to keep logs and to document training. We find no error in the ALJ's inference of intent in light of the holding contained in Chaney v. Dags Branch Coal Co., supra.

Because the ALJ performed the appropriate analysis in the opinion on remand and order on petition for reconsideration in finding a safety violation based upon a specific regulation or statute, and substantial evidence supports her findings, her determination will not be disturbed on appeal.

Although the ALJ could have ended her analysis after finding Brake Parts had intentionally violated a specific statute or regulation, she additionally found it had violated the general duty clause contained in KRS 338.031 by failing to provide Middleton with fall protection as required by the operator's manual for the JGL MODEL 10 MSP lift.

Gray's testimony and report constitute substantial evidence supporting of the ALJ's finding of a violation of the general duty clause. The operator's manual states, "JLG Industries, Inc. requires that the

operator utilize a fall restraint system in the platform with a maximum 30 inch (76 cm) lanyard attached to an authorized lanyard anchorage point." It is uncontroverted at the time of the accident no such lanyard was in place. Gray testified Middleton should have been wearing fall protection when working. Gray explained while fall protection is required while working at or above six feet in a construction setting, however, in an industrial setting, it is required when working at a height of greater than four feet pursuant to 29 CFR 1910.178. Gray also cited to the operator's manual, which requires the use of a lanyard. Gray opined the use of a lanyard would have prevented Middleton's fall. Gray also testified the OSHA standards require an employer to follow the instructions provided by the manufacturer, and in this instance, OSHA regulations required Brake Parts to utilize a lanyard as instructed in the operator's manual.

In the opinion on remand, the ALJ engaged in the four part test used in Lexington-Fayette Urban County Government v. Offutt, 11 S.W.3d 598, 599-600 (Ky. App. 2000), to determine whether there had been a violation of KRS 338.031: a condition or activity in the workplace presented a hazard to employees; the cited employer or employer's industry recognized the hazard; the hazard was

likely to cause death or serious physical harm; and a feasible means existed to eliminate or materially reduce the hazard. The ALJ addressed each element, finding in favor of a violation KRS 338.031 for each. Substantial evidence, in the form of the operator's manual, Gray's testimony and report, and Middleton's testimony, supports the ALJ's findings under each element.

The ALJ additionally found an intentional violation of the general duty clause because Brake Parts had acknowledged the manufacturer's requirement a lanyard be used while operating the lift as stated in the operator's manual, which it either ignored or disregarded. Although Brake Parts presented evidence from Martin that no fall protection was required, the ALJ choose to rely instead upon contrary evidence. The ALJ acted within her authority as fact-finder, and her ultimate determination of the applicability of a safety violation will not be disturbed. Magic Coal Co. v. Fox, supra; Whittaker v. Rowland, supra.

The opinion on remand and the order on Brake Parts' petition for reconsideration adequately addressed the concerns raised by this Board in its January 30, 2015 opinion vacating and remanding, and preformed the

appropriate analyses in support of the application of the safety penalty pursuant to KRS 342.165(1).

Therefore, the March 31, 2015 Opinion on Remand and May 1, 2015 order denying Brake Parts' petition for reconsideration by Hon. Jane Rice Williams, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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