Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 30, 2015

CLAIM NO. 201180389

READY ELECTRIC PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN**
ADMINISTRATIVE LAW JUDGE

THOMAS K. SCHARRINGHAUSEN
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. Ready Electric appeals from the June 2, 2015 Order on Remand rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ"). The ALJ enhanced an award of income benefits to Thomas Scharringhausen ("Scharringhausen") pursuant to KRS 342.165(1). On appeal,

Ready Electric challenges the imposition of this safety penalty. For the reasons set forth herein, we affirm.

Scharringhausen injured his left leg and ankle on July 25, 2011 when he was pulled into an exhaust fan. At the time of his injury, he had been placed at Ready Electric as part of a union training program, working towards an apprentice certification. Because of his experience prior to the apprenticeship, he was classified as a commercial electrician.

Prior to the injury, Scharringhausen was assigned to work with Mike Phillips, a journeyman electrician. According to Scharringhausen's testimony, Phillips was the "commander in charge" and he did "pretty much whatever [Phillips] says." At a deposition, Phillips characterized himself as the "boss or foreman" and Scharringhausen's job was to "assist him."

On July 25, 2011, Scharringhausen and Phillips drove a service truck to a job site in order to repair a six foot industrial exhaust fan on the roof of a two-story building. In a prior appeal in this matter, we described the circumstances surrounding Scharringhausen's injury as follows:

> Before going to the roof, Scharringhausen and Phillips went to the electrical area on the first floor to

de-energize the exhaust fan. The electrical area contained control boxes and disconnects to various equipment. In the presence of Scharringhausen, Phillips locked out the disconnect dedicated to provide power to the exhaust fan. Phillips switched the disconnect to the off position, and placed a lock on it to prevent others from energizing it while he and Scharringhausen repaired the fan. The lock is operated with a key and contains a tag with contact information. Phillips maintained possession of the key to the lock.

Phillips and Scharringhausen then went to the roof. An additional switch resembling a traditional light switch which supplies power to the exhaust fan motor is located near the exhaust fan. Scharringhausen testified the switch was in the off position, and they tested the voltage to ensure no power was running to the exhaust fan. At his second deposition, Scharringhausen testified this switch could have been locked out/tagged out, but that was not done on July 25, 2011. Scharringhausen testified Phillips, as foreman, was the only person authorized to lock out/tag out the disconnect. Scharringhausen testified "as an apprentice I'm not allowed to work on a live circuit, period. The foreman's in complete control of lockout/ tagout."

Phillips and Scharringhausen disassembled the fan and worked to replace the pulley system. At some point, Phillips left the roof in the bucket truck to retrieve additional tools. Phillips returned shortly thereafter, and they both continued to work on installing belts. Scharringhausen was standing within the casing of the exhaust fan installing the

second belt. Phillips was leaning over to help, when Scharringhausen testified he heard a “click,” which signified the exhaust fan was turning on.

Scharringhausen does not remember the details of following events, but the blades of the fan impacted his left foot and leg. Phillips picked Scharringhausen up, carried him to the bucket truck, and lowered him to ground level. Emergency aid was administered, and Scharringhausen was transported by ambulance to the hospital. Surgery was performed that night and Scharringhausen was admitted into the hospital for a week or two. Subsequently, two more surgeries where performed to remove the external fixator and pins. Scharringhausen testified he is now an apprentice electrician, and has completed approximately half of the five year program.

At the time of the accident, Scharringhausen thought the disconnect downstairs was locked out, and he was unaware of how the exhaust fan had been powered on. Later, during his hospital stay, Phillips told him he had removed the lockout/tagout device from the disconnect downstairs when he went to retrieve additional tools. Scharringhausen stated at the time of the accident, Phillips did not tell him he had removed the lockout/tagout device. Scharringhausen suspects Phillips inadvertently turned on the switch next to the exhaust fan on the roof. Scharringhausen testified if the downstairs disconnect had been properly locked out/tagged out, the accident would have never happened. Scharringhausen emphasized Phillips was employed as a foreman for Ready Electric, and therefore represented the company.

Phillips, a journeyman electrician, testified by deposition on January 22, 2014. Phillips stated he completed a five year apprenticeship program, which includes classroom work as well as on-the-job training, to become a journeyman electrician. The apprenticeship program was offered through the local union. Since completing the apprenticeship program 1995, Phillips stated he has worked as an electrician. He worked for Henderson Electric for fifteen years, and has been in the employ of Ready Electric for six years as a service technician. Phillips is currently a member of the local union. Phillips completes eight hours of continuing education to keep his license current through the state of Kentucky.

Phillips confirmed Scharringhausen was not in the apprenticeship program at the time of the accident, but was a commercial electrician. Scharringhausen's job was to assist him as foreman. Phillips testified he and Scharringhausen arrived at the job site, and went to the electrical area downstairs to lock out/tag out the disconnect to the exhaust fan. Phillips placed the disconnect to the off position, and put a lock on it to prevent others from turning it on while they worked on the fan. They then traveled in the bucket from their truck to the roof and after inspection, determined the exhaust fan's motor was not faulty.

Phillips testified he and Scharringhausen left the roof, and went to the electrical area downstairs to take the lock off the disconnect, and turn the power on to allow them to check the fan's motor. Phillips insists Scharringhausen was with him when he

removed the lock from the disconnect on the first floor. Phillips did not know whether Scharringhausen had a key to the lock.

Phillips and Scharringhausen returned to the roof, and turned the fan on. They determined the issue was the pulley system. Phillips and Scharringhausen left the roof again and a company representative from Neill-LaVielle provided them with a replacement pulley. Phillips testified he and Scharringhausen returned to the roof. He explained there is a service switch by the exhaust fan, and that "we turned the service switch off." He and Scharringhausen began working, and as they were installing the last belt the motor started. Phillips stated he does not remember turning the service switch off after the accident in order to help Scharringhausen out of the fan.

Phillips testified the service switch is beside the exhaust fan, and is a "disconnect switch put there to work on a piece of equipment." The service switch has an on and off position. When asked why he did not go back down to the first floor and lock out the disconnect, Phillips replied, "I don't know why we didn't really. I don't know why. I guess we figured that the service switch as the top was adequate. That's what it was put there for." Phillips stated he did not know whether it was possible to put a logout/tagout device on the service switch next to the exhaust fan. Phillips did not know why or how the exhaust fan started since the service switch was off. Phillips testified "there is no way" he could have inadvertently or accidently turned the service switch on. He guessed the service switch was "somehow defective" or the "motor was single phasing."

Phillips agreed if the disconnect downstairs had been locked out the exhaust fan would not have started even if the service switch upstairs had been turned on. Phillips testified he was disciplined by Ready Electric after the accident, consisting of suspension for three days without pay. Phillips did not remember talking to Scharringhausen later in the hospital about whether he turned on the service switch.

Phillips testified Ready Electric held "tool box talks" once a week, and stated his employer had trained him on proper lockout/tagout procedures. Phillips completed an accident investigation report which he signed and dated on July 25, 2011. The accident was described as follows:

> We were replacing pulley + belts on the exhaust fan when somehow the switch on the unit was hit and it started up. Unit was locked out initially. We unlocked it after replacing belts so that we could run it. This is when we found that the pulleys were defective and needed replaced.

Jeffrey Callam ("Callam"), the safety director of Ready Electric, testified by deposition on January 22, 2014. Ready Electric has been in business since 1949, and currently has approximately twenty-five employees. He confirmed Scharringhausen was laid off due to lack of work. At the time Scharringhausen was laid off, he was in the apprenticeship program and was sent back to the union for reassignment.

Callam testified each new employee participates in orientation which includes a safety program ("the

program”). A copy of the program was attached as an exhibit. The program covers lock out/tag out procedures, and lists eleven rules when locking is necessary. The program clearly states the foreman (in this instance Phillips) controls the main lockout; a lock and tag will be placed on each disconnecting means used to de-energize circuits and equipment on which work is to be performed; and if more than one employee is working on a particular circuit that has been locked out by another, it is necessary this employee also place his lock and tag on the device or switch. Regarding the last rule listed, Callam stated since this particular case involved only a two-person job, only one lock would have been sufficient.

Callam also indicated Ready Electric has a documented lock out/tag out policy (“the policy”), which is provided to every foreman and jobsite. The relevant portions of the policy were also attached as an exhibit. The policy lists seven steps in lock out/tag out procedures. It states lock out/tag out procedures should only be carried out by authorized employees. It also states before the application of lock out or tag out devices, all affected personnel are to be notified, and all workers are to be told the energy control procedure is going to be used and why. Callam testified an employee is required to ensure all personnel, tools, and other equipment are clear of the equipment before the removal of a lockout/tagout device.

Callam agreed the above safety procedures and policies developed by Ready Electric addressing lockout/ tagout procedures are based upon OSHA standards, which incorporate the National Fire Prevention Act (“NFPA”)

standards on control of energy. In this instance, pursuant to 65 CFR 1910, Phillips was the authorized employee as the journeyman/foreman, and Scharringhausen was an effected employee. Callam agreed the job performed by Phillips and Scharringhausen involved the control of energy. He also agreed lockout/tagout devices are to be placed upon energy isolated devices under the OSHA standards, which could be the disconnect in the electrical area or the service switch on the roof.

Callam was immediately notified by phone of the accident, and arrived at Neill-Lavielle Company after Scharringhausen had been taken to the hospital. Callam prepared an accident investigation report, which he finalized on July 29, 2011, as well as a five page narrative report. Both were attached as exhibits to his deposition. The attached "Safety Director Accident Investigation Report" listed the cause of the accident as "not placing lockout/tagout materials on the motor's switch prior to beginning work." The five page "Accident Investigation Report" narrative concluded with the following heading, "Company Rules/Policy & OSHA Violation." The relevant violations identified by Callam were "[v]erification that the disconnect that was locked out was actually the power supply for the roof top exhaust fan" and "[n]ot utilizing lockout/tagout 100% on disconnect and or 3 pole motor switch."

Through his investigation, Callam concluded while the last belt was being installed, it came under the service switch and as Scharringhausen and Phillips tightened the pulley system, the belt itself turned the switch on. Callam testified there is a device that

> could have locked out the service switch on the roof by the exhaust fan. He stated this device would have been in the service van, and Phillips had access to it. Callam testified the downstairs disconnect and the service switch were not faulty.
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> Callam testified Phillips was the supervisor/ foreman of the job on the day of the accident, and he was ultimately responsible for lock out/tag out. However, Callam stated employees are also responsible for their own safety. Callam confirmed Phillips was disciplined as a result of the accident by being given a leave of absence for at least a week without pay. When asked if Phillips violated Ready Electric's lockout/tagout policy on the day of the accident, Callam stated "Yes, obviously." Callam stated Phillips erred by not locking out the equipment.
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> Callam disagreed that construction electricians do not have access to locks to lockout/tagout devices, explaining, "[a]ll they have to do is ask." He indicated electricians, regardless of classification, are not furnished a lock until asked for. In this instance, Callam testified the locks would have been on the service truck driven to the job site by Phillips and Scharringhausen. Callam did not know whether Scharringhausen was provided a key, noting he never specifically asked him.

In an Opinion rendered October 6, 2014, the ALJ awarded temporary total disability, permanent partial disability and medical benefits. Additionally, the ALJ

enhanced the income benefits pursuant to KRS 342.165, explaining:

> There is a disagreement over whether the plaintiff is entitled to have his income benefits increased by 30% pursuant to KRS 342.165. That statute provides, in part, if an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulations 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 30% in the amount of each payment. In *Lexington – Fayette Urban County* Government *v. Offutt*, 11 S W3d 598 (Ky. App. 2000), the court used a four part test for applying the safety penalty provisions. The test considers: (1) a condition or activity in the workplace presented a hazard to employees; (2) the cited employer or employer's industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible means existed to eliminate or materially reduce the hazard.
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> In this particular instance, an especially dangerous workplace condition occurred when the employer had the plaintiff, an apprentice working on [sic] electrical fan motor which was supplied with electricity. The responsible person failed to observe lockout/tag out procedures which created the dangerous condition. Without question, this is a hazard recognized in the electrical industry as is clearly indicated in the testimony of Jeff

> Callam, Mike Phillips and the plaintiff. Given the fact the plaintiff was working down in an industrial sized fan and the accident in question caused serious physical harm, there is no question that working on such an instrument without of observation of lockout/tag out procedures is a hazard likely to cause death or serious physical harm. To the undersigned, it is clear the plaintiff's supervisor disregarded the safety procedure and reengaged the electrical supply while the plaintiff was continuing to work in the dangerous position. To the undersigned this is a clear case for the application of the 30% penalty provision noted above. The plaintiff's income benefits shall be increased by 30%. Given the fact the plaintiff is entitled to have his temporary total disability benefits increased by a factor of 30% there is no overpayment of temporary total disability.

After its petition for reconsideration was denied, Ready Electric appealed to this Board. In an Opinion rendered April 24, 2014, we remanded the claim to the ALJ for further analysis concerning the application of KRS 342.165(1). We concluded it was unclear, based on the ALJ's analysis, whether he determined Ready Electric had violated the general duty clause of KRS 338.031(1)(a), or a specific safety statute. We also directed the ALJ to consider whether Ready Electric may be held liable for the negligent act of its employee, Phillips.

On remand, the ALJ again imposed the safety penalty. He explained:

> I find the plaintiff's accident and injury of July 25, 2011 occurred as a result of specific lockout/ tag out regulations set forth at 65 CFR 1910.147. Additionally, the actions of Mike Phillips (the plaintiff supervisor) violated specific company policy regarding lockout/tag out as outlined by the safety director, Jeff Callam. I find that after initially locking out and tagging out the power supply, Mike Phillips, intentionally removed the lockout/ tag out and prematurely re-engaged the power supply to the electrical fan motor on which the plaintiff (a commercial electrician who had not yet reached apprentice status) was working. This intentional act in violation of the specific company rule and safety regulation led to the severe injuries sustained by the plaintiff.
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> Pursuant to, *Chaney v. Dags Branch Coal Co.*, 240 4S.W.3d 95 (Ky. 2008), the matter must be analyzed as a violation of the specific regulation. Therefore, pursuant to the rules set forth in that case, "intent" is inferred to the employer from the failure to comply with the specific statute or regulation. As explained in *Able Verdon Const. v. Rivera*, 348 SW3d 749 (Ky. 2011), in specific violation cases the ALJ determines (1) the regulation governing the fact; (2) whether a violation occurred; and (3); whether the failure to comply with that regulation was a cause, in part, of the accident. If a specific statute or regulation is violated, intent is inferred. Here the lockout /tag out provision noted above govern the facts. Pursuant to the regulation, the plaintiff’s supervisor

was the authorized employee as the journeyman/foreman while the plaintiff was the affected employee. The supervisor violated the regulation when he failed to observe lockout/tag out procedure and re-engaged the electrical supply while the plaintiff continued to work on the fan motor. This failure to observe requirements of the company policy and regulation was the cause of the accident. In such an instance, intent is inferred as noted above.

The WCB has requested the ALJ to make additional findings in regards to whether the negligence of a co-worker can be imputed to the employer for imposition of the penalty provision of KRS 342.165. The dissent requests the ALJ to analyze the case pursuant to the recent board opinion *Gregory v. A & G Tree Service,* 2011 – 77648 (WCB April 10, 2015). In that case, the ALJ and the WCB found that in situations where the safety violation is committed by a co-worker and there was no failure by the employer to comply with a specific statute or administrative regulation, the claimant must establish the employer ignored or willfully overlooked a safety hazard that was reasonably foreseeable. Great emphasis was placed on the fact the ALJ in that case believed company witnesses who claimed to have no knowledge that one of its employees (who happened to be the injured employee's supervisor) was acting negligently or recklessly prior to the accident and injury. The ALJ and the WCB felt there was no way the employer could have foreseen such a negligent act and therefore declined to impute the co-employee's negligence to the employer. In the present case the co-employee also happens to be the injured party's supervisor. However, in the instant case the supervisor intentionally

violated a specific safety regulation and company policy. Therefore, the foreseeability analysis set forth in *Gregory* is not as applicable. The ALJ notes that in addition to the unpublished case *Enro Shirt Company v. Joyce Hall Overstreet,* 95-SC-853-WC (June 20, 1996, designated not to be published) the court has had little difficulty imputing the negligent acts of supervisors to the defendant in prior general duty cases such as *Offutt* wherein training officers (supervisors) were aware of the dangers of exercising in extreme conditions but nevertheless subjected a trainee to the dangerous condition. Additionally, in the recent unpublished Supreme Court decision *Kenneth Scruggs v. West Lake PVC Corporation*, 2013–SC–000052–WC (Ky. June 19, 2014, designated not to be published) the Supreme Court of Kentucky had little trouble enhancing an award of benefits to a plaintiff whose supervisor placed in a dangerous position by having him test a safety harness when he clearly suspected something was wrong. The case involved a general duty violation under KRS 338.031 and there was no indication whatsoever the employer had any prior knowledge of this particular supervisor acting in such a negligent fashion. The facts of that case indicate the supervisor suspected a malfunctioning safety harness and placed the plaintiff in the safety harness for inspection rather than awaiting inspection from the manufacturer. Further, in instances of specific violation such as in *Chaney*, the court also placed liability for enhanced benefits on the employer due to the negligent actions of the supervisor who failed to follow the defendant's own roof control plan by failing to timely place warning devices to warn the employee he was working under

unsupported roof.

Ready Electric again appeals. It argues Phillips' actions cannot be imputed to his employer, particularly where he acted in direct contravention of company policy and procedure. In essence, Ready Electric claims Phillips is not "the employer" for purposes of KRS 342.165.

We disagree. The ALJ determined Scharringhausen was injured as a result of a violation of the lockout regulations set forth in 65 CFR 1910.147. Callum's testimony is substantial evidence to support this conclusion. An employer is presumed to know what specific state and federal statutes and regulations concerning workplace safety are applicable. As such, the employer's intent is inferred from the failure to comply with a specific statute or regulation. Chaney v. Dags Branch Coal Co., 244 S.W.3d 95, 101 (Ky. 2008).

Nonetheless, Ready Electric makes a compelling argument that it should not be penalized for Phillips' "rogue" act. Indeed, Ready Electric had numerous policies and procedures regulating lockout requirements. There is no doubt Phillips violated these company policies, and thereby caused Scharringhausen's injury. Furthermore, Ready Electric emphasizes Phillips was a good employee with no prior history of negligence or failure to follow safety

policies. For this reason, we are not without sympathy for an employer who is penalized despite making every good faith effort to ensure the safety of its employees through policy, regulation, safety meetings, and safety equipment.

However, we likewise cannot ignore the fact Ready Electric placed Phillips in a supervisory position over Scharringhausen. An employer cannot avoid a safety penalty through delegation of its responsibilities to supervisory staff. Rather, Kentucky courts have imposed the safety penalty even when a supervisor's actions, which cause injury to another employee, are in direct contravention of company policy. *See* Lexington-Fayette Urban County Government v. Offutt, 11 S.W.3d 598 (Ky. App. 2000)(safety penalty imposed where supervisors conducted outdoor training session in extreme heat despite being provided memorandum concerning danger of heat stroke). *See also* Hornback v. Hardin Memorial Hosp., 411 S.W.3d 220 (Ky. 2013)(hospital security team counseled employee to jump from stalled elevator, causing injury); Scruggs v. West Lake PVC Corp., 2013-SC-000052-WC (Ky. 2014)(safety penalty imposed where supervisor instructed employee to test a safety harness despite suspicion it would malfunction and in violation of company policy).

Like the ALJ, we are able to distinguish the facts of this case from our decision in Gregory v. A&G Tree Service, Claim No. 2011-77648 (April 10, 2015). Gregory was injured in a car accident which occurred after the work day, while being driven by his supervisor from the work site to his personal vehicle. Gregory testified his supervisor was driving erratically, though he was not cited by the Kentucky State Police for any traffic violation after the accident. It was also established Gregory's supervisor had several prior speeding tickets.

The ALJ declined to impose the safety penalty for an alleged violation of the general duty clause, and we affirmed. Even if Gregory's supervisor caused the accident by careless driving, it was not established the employer was previously aware his driving habits posed a danger to other employees. Thus, there was no evidence to establish or presume the employer's intent to violate a specific safety statute or the general duty clause.

The circumstances in this case are distinguishable. The ALJ determined Ready Electric violated a specific safety statute concerning lockout procedures. Thus, its knowledge of the hazards of a live circuit is established and its intent is inferred. We also note,

unlike in Gregory, Phillips was acting in his supervisory position when the injury occurred.

For the foregoing reasons, we conclude the ALJ properly determined Scharringhausen was injured by his employer's failure, through Phillips' actions, to comply with a specific safety regulation. As such, the June 2, 2015 Opinion on Remand, rendered by Hon. John B. Coleman, Administrative Law Judge, is hereby **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, DISSENTS AND FILES A SEPARATE OPINION.

STIVERS, MEMBER. Because the ALJ did not engage in the analysis discussed in my prior dissent in this case, I respectfully dissent.

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