

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: April 24, 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 IN PART,  
VACATING IN PART & REMANDING

\* \* \* \* \*

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

**ALVEY, Chairman.** Ready Electric appeals from the Opinion and Award rendered October 6, 2014 by Hon. John B. Coleman, Administrative Law Judge ("ALJ") awarding Thomas Scharringhausen ("Scharringhausen") temporary total disability benefits, permanent partial disability benefits, and medical benefits for severe left lower extremity

injuries occurring on July 25, 2011. Ready Electric also seeks review of the November 10, 2014 Order denying its petition for reconsideration.

The sole issue on appeal is whether the ALJ erred in enhancing Scharringhausen's income benefits by 30% for a safety provision violation by Ready Electric pursuant to KRS 342.165(1). Ready Electric argues although Phillips was Scharringhausen's supervisor at the time of the accident, he was not the employer, and his negligent act does not support the finding of an intentional act, or assessment of a safety penalty. We affirm in part, vacate in part, and remand for clarification and additional findings of fact on this issue. Since the only issue on appeal regards an alleged safety violation, we will not discuss in detail the medical evidence.

Scharringhausen filed a Form 101 alleging he injured his left leg and ankle on July 25, 2011 when his lower extremity was pulled into an exhaust fan while working as a commercial electrician for Ready Electric. The Form 101 was later amended to include an allegation of a safety violation by Ready Electric, a psychological injury, and vocational rehabilitation benefits. The July 25, 2011, work accident caused multiple fractures of the proximal and distal calcaneus, complete disruption of the Achilles'

tendon, and partial evulsion of the left heel. Following several surgeries and a period of rehabilitation, Scharringhausen returned to work for Ready Electric as an electrician without restrictions. He was laid off on September 27, 2013 due to lack of work, and currently works for Meiner Electrics.

Scharringhausen testified by deposition on September 9, 2013 and October 30, 2013. He also testified at the hearing held August 15, 2014. Scharringhausen was placed at Ready Electric through the local union in April 2011. At the time of the July 25, 2011 accident, Scharringhausen was a commercial electrician. He had yet to begin the apprenticeship program, and was not licensed or certified. Ready Electric primarily services commercial and industrial products, and his job was to assist the foreman/supervisor, Mike Phillips ("Phillips"), a journeyman electrician. Scharringhausen asserted Ready Electric, through Phillips, violated lockout/tagout procedures on the day of his accident.

On July 25, 2011, Scharringhausen and Phillips drove a service truck to the job site, Neill-Lavielle Company, to repair a six foot industrial exhaust fan on the roof of a two story building. The roof was accessed by a bucket truck. 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 were 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 accidentally 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.

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.

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 the opinion, the ALJ made the following analysis regarding the application of KRS 342.165:

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.

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.

Ready Electric filed a petition for reconsideration arguing although Phillips was Scharringhausen's supervisor "he was not his 'employer' for the purposes of KRS 342.165(1)." Ready Electric argued it cannot be penalized for a single negligent act of an employee unless it knew or should have known of his propensity for such act, which is not the case here. Ready Electric also argued there was no evidence an "intentional" failure to comply with a specific statute or administrative regulation. It also argued there is no evidence which "would impute the poor decision of Mr. Phillips back on the defendant-employer." Ready Electric argued the evidence did not support the imposition of the safety penalty, but did not request any additional findings of fact. The ALJ denied Ready Electric's petition on November 10, 2014, noting after re-reviewing the facts, this "is to be a clear case for imposition of the penalty."

On appeal, Ready Electric argues the ALJ found it violated the general duty statute of KRS 338.031(1)(a), rather than a specific statute or regulation, since he utilized the four part test outlined in Lexington-Fayette Urban County Government v. Offutt, 11 S.W.3d 598 (Ky. App. 2000). Since the ALJ found it violated the general duty statute, he was required to determine whether its violation was intentional. Ready Electric argues the ALJ failed to make a specific finding of intent, despite its request in its petition for reconsideration. In this instance, Ready Electric argues there is no evidence of an intentional failure to provide a safe work environment for its employees.

Ready Electric argues although Phillips made a poor decision, "this does not prove the 'intentional' aspect of the statute." Ready Electric again states there is no evidence which "would impute the single poor decision of Mr. Phillips back on the Petitioner. Petitioner respectfully submits that the 'employer' cannot be penalized for a single reckless or negligent act of an employee unless it knew or should have known of his propensity for such acts." Ready Electric emphasizes Phillips made a poor decision by removing the lock from the disconnect, but this did not rise to the level of "intentional" and which should be imputed

back to Ready Electric. It requests the claim be remanded to the ALJ to address the element of intent, and argues the overwhelming evidence compels a finding it did not intentionally commit a safety violation.

It is undisputed Scharringhausen sustained significant injuries due to the July 25, 2011 work accident. Regarding the safety penalty issue, KRS 342.165(1) provides in pertinent part 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 failed to comply with known safety regulations. 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. The Kentucky Court of Appeals in Lexington-Fayette Urban County Government v. Offutt, 11 S.W.3d 598 (Ky. App. 2000), applied a four-part test to determine whether a violation of KRS 338.031 had occurred. This test established a violation of a general duty clause occurs when, "(1) [a] condition or activity in the workplace presented a hazard to employees; (2)[t]he cited employer or employer's industry recognized the hazard; (3)[t]he hazard was likely to cause death or serious physical harm; and (4)[a] feasible means existed to eliminate or materially reduce the hazard." Id. at 599. After determining substantial evidence supported the finding of a KRS 338.031 violation, the Court then found the evidence supported a finding of an intentional violation by finding the facts more akin to those discussed in Apex Mining v. Blankenship, supra, than Cabinet for Workforce Development v. Cummins, supra. Id. at 600.

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 did not work, and it had caused 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 work site where the claimant worked 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. We believe the facts in Apex Mining illustrate one end of a continuum of employer conduct which ranges from egregious to the other end of the continuum illustrated in Cummins where the employer's conduct is innocuous.

We vacate and remand the claim to the ALJ for clarification and additional findings of fact regarding his ultimate determination of a safety violation by Ready Electric. As noted above, Scharringhausen was required to prove the existence of an intentional violation of a specific safety provision, whether state or federal.

"Intentional," as used in KRS 342.165(1), was defined in Barnet of Kentucky, Inc. v. Sallee, 605 S.W.2d 29 (Ky. 1980), wherein the supreme court held that intent depended on whether an employer determines to act in such a way that the regulation would be violated. Often, as here, intent is not subject to direct proof. Whether an employer "intended" to do a particular act is a matter of inference to be drawn from all the attendant circumstances. Moreover, it is well established in Kentucky authority that such reasonable inferences are for the ALJ as fact-finder and not this Board. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979).

In his opinion, it is unclear whether the ALJ found Ready Electric violated the general duty provision of KRS 338.031(1)(a) and/or a more specific safety statute or administrative regulation.

We decline to assume the ALJ found Ready Electric violated the general duty clause of KRS 338.031(1)(a) by

his use of the four-part test in Lexington Fayette Urban County Government v. Offutt, supra, as urged by Ready Electric. We decline to make this assumption particularly since the ALJ stated this test was used by the Court "for applying the safety penalty provisions." This is incorrect. The Kentucky Court of Appeals utilized this four-part test only to determine whether a violation of KRS 338.031 had occurred. Only after finding substantial evidence supporting the finding the test was satisfied, did the Court address the second element of KRS 342.165, an intentional violation.

Therefore, on remand, the ALJ is directed to clarify and identify which safety provision he found Ready Electric violated in support of his application of KRS 342.165(1). The four-part test utilized in Lexington Fayette Urban County Government v. Offutt, supra, is appropriate if the ALJ is indeed analyzing whether Ready Electric violated the general duty clause of KRS 338.031(1)(a). If the ALJ finds Ready Electric violated the general duty clause of KRS 338.031(1)(a), he must make additional findings of fact of whether Ready Electric's violation of the general duty statute was intentional pursuant to KRS 342.165(1). See Apex Mining v. Blankenship, supra; Cabinet for Workforce Development v. Cummins, supra.

However, if the ALJ determines Ready Electric violated a more specific safety statute or lawful administrative regulation, he must clearly identify the provision relied upon. As noted above:

An employer is presumed to know what specific state and federal statutes and regulations concerning workplace safety require. Thus, its intent is inferred from the failure to comply with a specific statute or regulation. If the violation 'in any degree' causes a work-related accident, KRS 342.165(1) applies.

Chaney v. Dags Branch Coal Co., 244 S.W.3d at 101.

Finally, Ready Electric argued in the petition for reconsideration and in its brief to the Board, it cannot be penalized, or found liable for Phillips' negligent act because he was Scharrinhausen's supervisor, not employer, at the time of the accident. On remand, the ALJ is instructed to make additional findings addressing whether Ready Electric can be held liable for Phillips' negligent act, and therefore assessed a 30% penalty pursuant to KRS 342.165(1).

While we make no findings as we are not permitted to do so, we note the previous unreported decision of the Kentucky Supreme Court, in Enro Shirt Company v. Joyce Hall Overstreet, 95-SC-853-WC (June 20, 1996, designated not to be published), which is cited for guidance, and not

authority. In that case, a defective outlet box had been removed from service by a maintenance supervisor. However, he left the box in the work area. A temporary worker on a construction crew saw the box, and reconnected it. Ms. Overstreet subsequently attempted to plug the cord of a glue gun into the outlet. When she did, she received a shock, the ALJ determined the employer was responsible for the negligent act of its employee. This determination was affirmed by this Board, the Kentucky Court of Appeals, and the Kentucky Supreme Court.

We also note that in Lexington Fayette Urban County Government v. Offutt, supra, the employer was held liable for the act of its employees, despite specific violations of its rules and policies. Again, despite the holdings in Overstreet, and Offutt, we do not direct the ALJ to arrive at any particular result.

Accordingly, the October 6, 2014 Opinion and Award and November 10, 2014 Order on petition for reconsideration by Hon. John B. Coleman, Administrative Law Judge, is hereby **VACATED** and **REMANDED** for an opinion in conformity with the views expressed herein.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

STIVERS, MEMBER, CONCURS IN PART, DISSENTS IN PART, AND FILES A SEPARATE OPINION.

**STIVERS, MEMBER.** I agree with the majority the matter must be remanded to the ALJ for further analysis regarding the application of KRS 342.165(1). However, I do not believe Enro Shirt Company and Hartford Insurance Company v. Overstreet, 95-SC-853-WC, rendered June 20, 1996, Designated Not To Be Published, is somehow applicable. In Enro, supra, Overstreet sustained an electrical shock injury due to a defective control box. Enro conceded the control box used by Overstreet was in violation of a safety regulation because the cover for the outlet box was secured in an unapproved manner with a metal strap and a flexible extension cord was used to replace the fixed wiring of a structure. Slip Op. at 2. In addition, the investigation conducted by the Kentucky Occupational Safety and Health Enforcement Division of the Labor Cabinet ("KOSHA") resulted in a citation for violating those two safety regulations. In assessing the 15% penalty pursuant to KRS 342.165(1), the ALJ noted Overstreet testified the outlet box in question was "'all over the place.'" The ALJ then stated as follows:

Surely eight years is sufficient for an employer the size of the defendant employer to be aware of the rule in question or to be presumed to be aware of it and therefore in violation of it. Further, the defendant employer was specifically aware of the defective

receptacle with the metal band around. It is incredible that no precautions were taken by the maintenance supervisor or the plaintiff's supervisor to prevent use of the receptacle.

Slip Op. at 3.

The Board and the Court of Appeals affirmed.

In affirming, the Supreme Court noted the Court of Appeals agreed with the Board's conclusion it was not unreasonable for the ALJ to infer that Enro intentionally failed to comply with the regulations by not permanently removing the outlet box and extension cords so that they could not have been replaced into service by a temporary subcontractor. Slip Op. at 4.

The Supreme Court noted Enro admitted it was aware of the violation prior to Overstreet's injury but contended it had removed the hazard prior to the date of her injury. Thus, it could not be responsible for the acts of an independent contractor placing the hazardous extension cord back into service without its knowledge which led to Overstreet's injury. The Supreme Court rejected Enro's position stating the testimony of Enro's supervisors evidences the fact Enro knew the cord to be hazardous and removed it from service approximately one week prior to Overstreet's injury. Slip Op. at 6.

Further, the supervisor's testimony revealed the cord was not marked in any way to show it was defective. Subsequently it was put back into service again. The Supreme Court agreed with the ALJ's statement the employer had years to learn that several of the outlet boxes failed to comply with applicable safety standards. It concluded actual knowledge was shown by the fact the employer planned to install new receptacles, as testified to by the supervisors. Thus, the Supreme Court agreed with the Court of Appeals' statement:

Failure to comply with safety regulations by not permanently removing the hazard and by allowing it be placed back into service, provides support for the ALJ's finding that the employer was intentionally in violation of a safety regulation at the time of [Overstreet's] injury.

Slip Op. at 6.

Significant to this case is the Supreme Court's statement that Enro's argument the hazardous condition was initially removed and later reappeared due to the actions of an unnamed temporary employee was irrelevant. Rather, the presence of a violation was the responsibility of the employer and the employer failed to take reasonable steps to ensure the hazardous cord would not be reused by disposing of the cord or labeling it hazardous. Therefore,

Enro could not in good faith attempt to place the blame somewhere else.

Clearly, Enro involved the existence of more than one violation of a safety regulation prior to the alleged work injury about which the employer was aware which was the cause of the employee's injury.

In the case *sub judice*, there was no existing violation of a safety regulation immediately before Scharringhausen's injury. The case *sub judice* concerns a spontaneous action by a co-worker which led to Scharringhausen's injury. Thus, at the time of the injury Ready Electric was not aware of a violation of a safety regulation giving rise to a duty to abate the violation.

On remand, the ALJ should be provided guidance as to the standard to be utilized when the spontaneous action of a co-worker, rather than the failure of the employer to abate a known safety violation, is the cause of the injury. Our recent decision in Gregory v. A & G Tree Service, 201177648, rendered April 10, 2015, sets forth the analysis the ALJ must undertake in determining whether to enhance the employee's income benefits for the employer's intentional failure to comply with a specific administrative regulation, when the violation results from the spontaneous action of a co-worker and cannot be

directly attributable to Ready Electric. Thus, I would remand with directions to the ALJ to perform the analysis in this case in accordance with our directive in Gregory v. A & G Tree Service, supra.

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