# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: February 12, 2016**

CLAIM NO. 201475681

TITAN ELECTRIC PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

HARD HAT WORKFORCE OF N. CAROLINA;
UNINSURED EMPLOYERS' FUND;
ANTHONY WARNER (DEC), MELISSA MARQUEZ-WARNER
& REGINA WILEY (CO-ADMINS);
RANDI VIBBERT AS PARENT/GUARDIAN/NEXT FRIEND OF
ABAGAIL WARNER, A MINOR
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING IN PART**
**VACATING IN PART**
**AND REMANDING**
* * * * * *

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

**RECHTER, Member.** Titan Electric ("Titan") appeals from the May 12, 2015 Opinion and Order, and the July 21, 2015, August 24, 2015, and September 25, 2015 orders ruling on petitions for reconsideration rendered by Hon. William J.

Rudloff, Administrative Law Judge ("ALJ"). Titan challenges the ALJ's finding that Anthony B. Warner II ("Warner") was its employee at the time of his death. Titan also contends the ALJ improperly admitted an OSHA report that had been appealed. For the reasons set forth herein, we affirm in part, vacate in part and remand.

The administrators for Warner's estate filed a Form 101 on October 10, 2014 alleging Warner fell into an unguarded elevator shaft on July 16, 2014, resulting in his death. At the time of his death, Warner was working at a construction site in Louisville, Kentucky. Titan was the electrical contractor for the project. Hard Hat Workforce of North Carolina ("Hard Hat") is a construction staffing company which Titan utilized to staff its projects. The central contested issue before the ALJ was whether Warner was an employee of Titan or Hard Hat at the time of his death, which necessarily involved inquiry into the relationship between the two companies.

Marc Holcomb ("Holcomb"), senior vice president for Hard Hat, testified by deposition on March 3, 2015. He explained Hard Hat is a staffing agency for construction projects. Typically, a potential worker completes an application with Hard Hat and goes through a vetting process, which includes reference checks, criminal

background checks, and drug testing. Once hired, the worker is an employee of Hard Hat and receives his or her wages and tax forms from Hard Hat.

According to Holcomb, Hard Hat never gave Titan express permission to hire individuals for Hard Hat, nor did it authorize Titan to place individuals on Hard Hat's payroll without it's consent. To be considered an employee of Hard Hat, an individual must go through the formal vetting process that includes drug testing and a criminal background check. Hard Hat terminated its relationship with Titan after a review in late 2014. Holcomb noted Titan had three significant lost time injuries in a thirty-five day period.

These procedures were not followed in Warner's hiring process. Joshua Boling ("Boling"), vice president of Titan, testified by deposition on March 3, 2015. Titan became a client of Hard Hat in April 2012 and utilized its staffing services. However, because Hard Hat had not previously operated in Kentucky, Boling anticipated a delay in providing sufficient staff. To this end, he placed advertisements on Craigslist. Warner responded and Boling directed him to meet with David Gilbreath ("Gilbreath") at the job site on July 14, 2014.

David Gilbreath, a superintendent for Titan, testified he interviewed Warner at the job site on July 14, 2014 and provided him with a Hard Hat application. Gilbreath acknowledged he placed Warner where he was working on the 15th and 16th of July, 2014 and told him what to do. Gilbreath was informed by Warner on the 15th of July that he had not completed his application but would complete it and bring it in on the 16th.

Once Gilbreath met with Warner, Boling emailed Hard Hat to inform them that Warner would be starting work at the site the following day and his paperwork would be forthcoming. Boling stated there had been prior instances in other states where paperwork had not been sent to Hard Hat before the worker commenced work, but it ultimately accepted the paperwork and paid workers for work performed prior to processing the paperwork. Nonetheless, Boling was never notified that Hard Hat had accepted Warner as an employee. On July 16, 2014, knowing Warner was deceased, Boling forwarded the application to Hard Hat. Titan never paid wages or benefits to Warner or his estate.

Jeffrey Anspach ("Anspach"), Titan's director of construction, testified by deposition on March 3, 2015. He was not involved with Warner's hiring. Anspach stated there were times when workers would begin working prior to

the completion of their paperwork. Hard Hat would pay the individuals after receiving the paperwork.

Josiah Boling, President and owner of Titan, testified by deposition on March 3, 2015. He explained Titan initially contracted with Hard Hat because it was a challenge for Titan to deal with the application process and unemployment claims of its employees. He also stated it was a benefit to Titan that Hard Hat would be the employer, and therefore be responsible for workers' compensation coverage.

Josiah Boling acknowledged Warner's paperwork was not transmitted to Hard Hat prior to his death. He also stated there were times in the past when Titan put an individual to work before the worker had completed a background check or the application process. Likewise, there had been instances in the past where individuals began working prior to completion of the vetting process and were paid for the work by Hard Hat. Josiah Bowling acknowledged this is no longer Titan's practice, however. Hard Hat was notified through an email from Joshua Boling that he had met with Warner and Titan wanted him to start the next day. Hard Hat never objected or responded. Hard Hat did not bill Titan for the hours Warner worked.

Josiah Bowling testified Titan had nothing to do with the scaffolding that had been erected in the elevator shaft prior to July 16th. Titan would have no work in the elevator shaft until the elevator was installed. Josiah Boling acknowledged Titan was fined $30,000.00 by OSHA for safety violations. Titan had pursued an appeal to reduce fines because some of the violations were created at the request of KOSH investigators to assist in the investigation.

Thomas DiMaio ("DiMaio"), territory manager for Hard Hat, testified by deposition on March 3, 2015. DiMaio received an email from Joshua Boling on July 14, 2014 stating he would be sending paperwork for a new hire in Louisville, Kentucky. The paperwork arrived after Warner's death. Hard Hat never had an opportunity to vet Warner prior to his death.

James Lorentz ("Lorentz"), the operations manager of Hard Hat, testified by deposition on March 3, 2015. Hard Hat's hiring process included a background check and drug testing. Hard Hat would never consider anyone to be an employee until the process was completed. Lorentz confirmed he received an email from Joshua Boling to DiMaio on December 13, 2014 stating, "I'm hiring a guy for Louisville. He's starting today. I need to know if the

application is current and do we need a Kentucky tax form? Also where can he go take a drug test." Lorentz indicated it would not be acceptable for Titan to let an individual start work as an employee of Hard Hat before the application was received and a drug test completed.

On July 17′ 2014, Lorentz learned of Warner's death and that the application had been received at 9:00 p.m. the night of July 16′ 2014, after Warner's death. Lorentz had not received the paperwork concerning Warner at that time. He flew to Louisville later that day and removed Hard Hat's workers from the job site on July 18′ 2014 because it was "incredibly unsafe." Lorentz spoke with Warner's widow, but he denied telling her Warner was Hard Hat's employee.

Melissa Marquez-Warner ("Marquez-Warner"), Warner's widow, testified by deposition on January 21, 2015. She helped Warner complete his application paperwork, and understood he was applying to work for Hard Hat at Titan's jobsite. Following Warner's death, she met with Lorentz, who told her Hard Hat was not aware Warner was an employee. They had been faxed the application on the night of the accident. According to Marquez-Warner, Lorentz told her that Warner was Hard Hat's employee. She

had been receiving checks for $94.50 from Eastern Alliance Insurance Company and a $10,000.00 lump sum had been sent to the attorney for the estate.

An OSHA report and citations prepared after the inspection on July 17, 2014 were filed by order dated March 17, 2015. Jeff Riecken ("Riecken"), Titan's safety director, was listed as supplying information for the report. The report noted Warner was in the process of laying out light fixtures to be installed when he stepped into an unguarded elevator shaft resulting in his fatal injury. It was noted Warner was intended to be a temporary employee of Hard Hat, but his paperwork had not been sent to the temp agency at the time of death. Titan was cited for insufficient lighting, material stored too close to the elevator opening, storage areas not kept free from materials causing a tripping hazard, violations concerning wiring laying on the floor creating a tripping hazard, failure to guard the elevator opening, and failure to train the employee in fall protection.

Riecken testified by deposition on March 3, 2015. He conducted an investigation for Titan following Warner's death. He confirmed the opening to the elevator was not covered despite OSHA requirements. Titan appealed the OSHA

citations because many were incorrect and some did not apply to Titan.

The ALJ ultimately determined Warner was Titan's employee at the time of his death. He explained:

> The Kentucky Supreme Court in *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116 (Ky.1991) stated that the proper legal analysis in this context consists of several tests in *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky.1965) and requires consideration of at least four predominant factors: (1) the nature of the work as related to the business generally carried on by the alleged employer; (2) the extent of control of exercised by the alleged employer; (2) the professional skill of the alleged employee, and (4) the true intent of the parties.
>
> I have read with interest the decision of the Court of Appeals in *Rahla v. Medical Center*, 2014 WL 1400102 (Ky.App.2014). There, the plaintiff was a candidate for a job with the Medical Center, but was not under a contract for hire at the time she was injured. Judge Miller determined that the plaintiff's claim for workers' compensation benefits should be denied and her decision was affirmed by the Court of Appeals.
>
> In light of the above-cited cases, I make the determination that at the time of Mr. Warner's death he was not an employee of Hard Het, but was an employee of Titan. He had not been approved for employment by Hard Hat, but was performing work benefiting Titan.

Titan filed a motion in limine to exclude the OSHA report, which the ALJ addressed in his May 12, 2015 Opinion and Order. He noted the OSHA report was a matter of public record, and then discussed his consideration of the safety penalty statute:

> As noted above, OSHA conducted an investigation after Mr. Warner's death. The certified OSHA report, which was filed in the record pursuant to Order dated March 17, 2015, states that there were 10 serious OSHA violations relating to Mr. Warner's death, some of which were likely causally related to his demise, including (1) insufficient lighting provided to the employee while performing his work in and around the elevator shaft location and (2) an open, unguarded elevator shaft on the second floor location where Mr. Warner fell. Based upon the uncontradicted facts of this case and the contents of the certified OSHA report, I make the determination that the insufficient lighting provided to Mr. Warner while performing his work in and around the elevator shaft location and the open, unguarded elevator shaft at the second floor location where Mr. Warner fell provide sufficient grounds for the imposition of the penalty provided for in KRS 342.165(1). I make the determination that said statute provides for a 30% increase in compensation since Mr. Warner's accident resulted from the employer's intentional failure to comply with specific safety statutes or regulations.

Titan filed a petition for reconsideration. Among other requests unrelated to the issues on appeal,

Titan sought additional findings to support the determination Warner was its employee. Titan also sought correction of an error in identifying Lorentz as an OSHA employee rather than as an employee of Hard Hat. Titan also objected to the ALJ's reliance upon the OSHA citations because they were not final.

In the July 21, 2015 Opinion and Order on Reconsideration, the ALJ indicated the reference to Lorentz being an OSHA employee was a clerical error, and the original decision was amended to reflect he was the operations manager for Hard Hat. The ALJ also amended the decision to include specific findings concerning the amounts of benefits and the manner of payment. He provided the following additional analysis concerning the issue of Warner's employer:

> KRS 342.610(1) mandates that every employer subject to the Workers' Compensation Act shall be liable for compensation for injuries, occupational disease or death without regard to fault as a cause of the injury, occupational disease or death.
>
> Based upon the findings of fact contained hereinabove and the fact that both Titan and Hard Hat agreed that they both had workers' compensation coverage at the time of Mr. Warner's death, I make the determination that Titan's workers' compensation coverage applies to Mr. Warner's death on July 16, 2014. I further make the

> determination that Hard Hat's workers' compensation coverage does not apply to Mr. Warner's death, since Hard Hat was not Mr. Warner's employer at the time of his demise.

Additional petitions for reconsideration were submitted by both Hard Hat and Titan, which do not relate to the issues on appeal and therefore, will not be further discussed.

On appeal, Titan argues the ALJ's analysis of Warner's employer was inadequate and failed to adequately set forth the basis of his decision. Titan expresses concern the ALJ improperly placed emphasis on Lorentz' report and testimony, who was misidentified by the ALJ as an OSHA employee. Titan also questions the adequacy of the ALJ's summary of the evidence, which fails to discuss each witness' testimony.

We find the ALJ's analysis regarding the responsible employer inadequate and his discussion of the evidence incomplete. We therefore vacate the determination that Warner was Titan's employee. An ALJ must set forth adequate findings of fact from the evidence to apprise the parties of the basis for his decision. Shields v. Pittsburgh and Midway Coal Min. Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Cmty. Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). The ALJ must also demonstrate that

all evidence was considered, correctly identify applicable law, and articulate his or her decision-making process.

It is not evident from the ALJ's analysis that he relied upon applicable law or fully considered the nuances of Titan's arguments or its proof. We are concerned by the ALJ's reference to Uninsured Employers' Fund v. Garland, 805 S.W.2d 116 (Ky. 1991), which involved a question of whether the worker was an independent contractor or an employee. There is no allegation in this claim that Warner was an independent contractor, and it is unclear whether the analysis impacted the ALJ's decision regarding Warner's employer. We are likewise troubled by the ALJ's failure to adequately distinguish Rahla v. Medical Center, 2014 WL 140002 (Ky. App. 2014) from the present matter, or to explain how the Rahla case impacted his decision. The Rahla case concerns an injury which occurred during the application process, and is factually distinguishable from the present matter. Instead, it appears the ALJ merely concluded the application process had not been completed and therefore Warner was not an employee of Hard Hat. While this circumstance may be determinative of the matter, it was incumbent upon the ALJ to consider the argument presented by Titan; that is, whether the course of conduct of the parties was sufficient to establish an employment

relationship between Warner and Hard Hat. The ALJ's failure to thoroughly summarize the testimony of all the deponents in this case casts further doubt as to the sufficiency of the analysis.

For these reasons, the determination Warner was an employee of Titan at the time of his death must be vacated and this claim remanded to the ALJ for further analysis. To be clear, this Board states no opinion as to the sufficiency of the evidence and directs no particular result.

Titan also argues the ALJ's admission of the OSHA report was improper. It argues the report should not have been considered concerning the determination of employer status or the alleged safety violation, because it had been appealed and was not final. Titan states its primary concern is the possibility of the ALJ "mistakenly concluding that an OSHA citation rendered against Titan automatically meant that Titan was the employer and its effect of imposition of the statutory safety violation."

We find no error in the admission of the OSHA report. The OSHA inspector is qualified to give an opinion regarding his observations and applicable safety regulations. Titan makes no argument concerning the investigator's qualification to offer an opinion. Rather,

its objections only go to the fact the citations had been appealed, and the possibility the ALJ may have considered the report in determining Titan was the employer. In the original decision, the finding of a safety violation was based primarily upon the presence of the open, unguarded elevator opening. Josiah Boling admitted the opening was not guarded. The opinions in the OSHA report are substantial evidence that the open, unguarded elevator opening was a violation causing the accident that resulted in Warner's death. There is no indication the ALJ considered the issuance of the citation as requiring a finding of a violation as a matter of law. There is likewise no indication the ALJ considered statements in the OSHA report as a basis for finding Titan was Warner's employer.

Accordingly, the May 12, 2015 Opinion and Order, and the July 21, 2015, August 24, 2015, and September 25, 2015 orders ruling on petitions for reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge are hereby **AFFIRMED IN PART, VACATED IN PART** and this matter is **REMANDED** for additional findings consistent with the views expressed herein.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, CONCURS IN RESULT ONLY.

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