

**Commonwealth of Kentucky
Workers' Compensation Board**

OPINION ENTERED: January 29, 2016

CLAIM NO. 201401557

UNINSURED EMPLOYERS' FUND

PETITIONER

VS.

**APPEAL FROM HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE**

CANDI MCKINNEY, as ADMINISTRATRIX
of the ESTATE of DANIEL R. MCKINNEY,
ROTENS TREE SERVICE,
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

AND

CANDI MCKINNEY, as ADMINISTRATRIX
of the ESTATE of DANIEL R. MCKINNEY

CROSS-PETITIONER

VS.

ROTENS TREE SERVICE,
UNINSURED EMPLOYERS' FUND,
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE

CROSS-RESPONDENTS

RESPONDENT

**OPINION
AFFIRMING ON APPEAL
AFFIRMING IN PART AND VACATING IN PART
AND REMANDING ON CROSS-APPEAL**

* * * * *

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

STIVERS, Member. The Uninsured Employers' Fund ("UEF") appeals from the February 13, 2015, Interlocutory Opinion and Order, the August 18, 2015, Opinion, Award, and Order, and the August 26, 2015, Order ruling on its petition for reconsideration of Hon. Douglas W. Gott, Administrative Law Judge ("ALJ"). Candi McKinney, Administratrix of the Estate of Daniel R. McKinney ("the Estate") cross-appeals from the August 18, 2015, Opinion, Award, and Order.

In the February 13, 2015, Interlocutory Opinion and Order, the ALJ overruled the UEF's motion to dismiss and granted the Estate's motion to correct a clerical error and allow the caption to read "Candi McKinney, Administratrix of the Estate of Daniel McKinney." In the August 18, 2015 decision, the ALJ awarded the Estate death benefits pursuant to KRS 342.750 as a result of Daniel McKinney's ("McKinney") work-related death. The ALJ determined the award of income benefits should not be enhanced by 30% or reduced by 15%. See KRS 342.165(1). In the August 26, 2015, Order the ALJ incorporated the findings in the interlocutory order into the August 18, 2015, Opinion, Award, and Order and overruled the UEF's petition for reconsideration.

On appeal, the UEF argues the ALJ should have dismissed the Estate's claim against it and Roten's Tree

Service ("Roten's") since the claim was not filed in the name of Candi McKinney, as Administratrix of the Estate of Daniel R. McKinney. Noting the Form 101 was filed in the name of Daniel Ray McKinney, it argues a deceased person cannot bring an individual action before a court or administrative body. Therefore, the Department of Workers' Claims ("DWC") should never have allowed the claim to be filed. The UEF maintains the ALJ did not have jurisdiction over the claim and jurisdiction cannot be waived.

The UEF relies upon this Board's holding in Estate of Joseph Hayward Parks v. Wallace Cotton, UEF, and Hon. Richard M. Joiner, ALJ, Claim No. 2011-00013, entered August 27, 2012. In that case, the Board dismissed the appeal finding that only the personal representative of the Estate may institute the action against the Defendant and the UEF. The UEF asserts since an estate can only act through the personal representative, failure to name the personal representative is a jurisdictional defect. Thus, the ALJ should not have sustained the Plaintiff's motion to amend designating Candi McKinney, Administratrix of the Estate, as the party bringing the action since the failure to name an indispensable party was a jurisdictional defect.

The UEF also argues the ALJ erroneously granted the motion to amend the Form 101 because the two year

statute of limitations had expired at the time the motion was filed. The UEF notes McKinney died on October 3, 2012, the Form 101 was filed on August 11, 2014, and the motion to amend the Form 101 was filed on January 26, 2015, more than two years after McKinney's death. The UEF contends even though the ALJ permitted the late amendment of the Form 101, he also permitted the Defendants to raise the defense that the late amendment was barred by the statute of limitations. In support of its position, the UEF relies upon City of Danville, Kentucky, a Municipal Corporation v. Hon. Gilbert M. Wilson, Judge, Boyle Circuit Court, et al., 395 S.W.2d 583 (Ky. App. 1965).

We affirm on appeal.

The Form 101 styled "Daniel Ray McKinney v. Roten's Tree Service" was filed August 11, 2014. However, the Plaintiff's signature notarized on August 6, 2014, is Candi McKinney, as Administratrix of the Estate of Daniel R. McKinney. Similarly, the Form 104 (Plaintiff's Employment History), the Form 105 (Plaintiff's Chronological Medical History), and the Medical Waiver and Consent are signed by Candi McKinney, as Administratrix of the Estate of Daniel R. McKinney. Attached to the Form 101 is the June 26, 2014, Order appointing Candi Rochelle

McKinney, as Administratrix of the Estate of Daniel Ray McKinney.

On August 12, 2014, the Commissioner of the DWC, Hon. Dwight Lovan ("Commissioner") notified the parties there was no matching first report of injury. On the same date, the Commissioner also certified Roten's was without workers' compensation insurance coverage on October 3, 2012.

In an Order dated September 2, 2014, styled Daniel R. McKinney, deceased, Administratrix Candi McKinney, Hon. J. Landon Overfield, former Chief Administrative Law Judge ("CALJ") entered an order noting the DWC had certified Roten's was uninsured on the date of the alleged injury and joining the UEF as a party/defendant to the action.

On September 12, 2014, the UEF filed a Notice of Claim Denial or Acceptance. Significantly, although it stated the claim was barred by limitations, the UEF did not file a Special Answer asserting as a special defense the claim was barred by the statute of limitations.

On September 26, 2014, Roten's filed its Form 111 asserting as a defense McKinney was an independent contractor and was not its employee at all times in question.

Various medical records relating to McKinney's death were filed, including the post-mortem examination report from the Office of the Chief Medical Examiner.

On November 10, 2014, in a motion styled Candi McKinney, as Administratrix of the Estate of Daniel R. McKinney, the Estate sought an extension of proof time which was granted by order dated November 25, 2014.

On December 1, 2014, the November 20, 2014, deposition of Jeff Roten ("Jeff"), the owner of Roten's, was filed in the record.

The January 14, 2015, Benefit Review Conference ("BRC") Order & Memorandum reveals the parties stipulated McKinney sustained a work-related injury or injuries on August 3, 2012, and notice was timely given. Under "[o]ther Matters," the ALJ wrote "proceedings continued generally pending motion to dismiss expected to be filed by the Defendant-Employer and UEF" and "ALJ will rule on motion after deadlines for responses."

On January 22, 2015, the UEF filed a motion to dismiss asserting the Form 101 was filed on behalf of McKinney on August 11, 2014. It acknowledged the Form 101 was signed by Candi McKinney, as Administratrix of the Estate of Daniel R. McKinney. However, neither she nor the Estate were named as the Plaintiff. It asserted the

failure to name an indispensable party is a jurisdictional defect fatal to the claim. Therefore, the ALJ was without jurisdiction to rule on the merits of the claim. As it does on appeal, the UEF cited to the Board's holding in the Estate of Joseph Hayward Parks v. Wallace Cotton, UEF, and Hon. Richard M. Joiner, ALJ, supra.

On January 26, 2015, the Estate filed a motion to amend the Form 101 asserting it had properly filed a Form 101 signed by Candi McKinney, Administratrix of the Estate of Daniel R. McKinney. However, it contained a clerical error, as "the Estate of" was not on the caption of the Form 101. The Estate asserted Candi McKinney signed all the documents in her capacity as Administratrix. To avoid any confusion, the Estate sought leave to correct the clerical error and allow the caption to read "Candi McKinney, Administratrix of the Estate of Daniel R. McKinney." The Estate provided the grounds supporting the motion.

On February 2, 2015, the UEF filed an objection to the Plaintiff's motion to amend pointing out Candi McKinney, as Administratrix, had not been named as party to the action and the statute of limitations expired on August 12, 2014. The UEF's objection mirrors its argument on

appeal. It also addressed the other grounds raised in the motion to amend.

In the ALJ's February 13, 2015, Interlocutory Opinion and Order overruling the UEF's motion and sustaining the Estate's motion, the ALJ provided the following:

The source of the dispute is that the "Plaintiff" identified on the cover of the Form 101 is "Daniel Ray McKinney." Of significance, the signature lines for "Plaintiff" on the Forms 101, 104, 105, and 106 were signed as "Candi McKinney, as admin of estate of Daniel R. McKinney."

The statute of limitations on the claim expired on October 3, 2014. At the Benefit Review Conference on January 14, 2015, counsel for Defendants Roten's Tree Service and Uninsured Employers Fund advised the ALJ of their intention to file a motion to dismiss. The ALJ continued matters to allow for that, and the motion was subsequently filed on January 22, 2015. Plaintiff has filed a response and a motion to amend to recognize Candi McKinney, as Administratrix of the Estate of Daniel R. McKinney, as the party bringing this claim.

The UEF argues that Candi McKinney, as administrator of Daniel McKinney's estate, is the indispensable party and the failure to list her as Plaintiff is a fatal jurisdictional defect. *Commonwealth of Kentucky, Department of Finance, Division of Printing v. Drury*, 846 S.W.2d (Ky. 1993). The UEF pointed the ALJ to *Bush v. Quality Control Services*, 2007 WL 3121853, also an

uninsured employer case where the Court of Appeals upheld the Board's dismissal of an appeal because a claimant had failed to name the UEF in the notice of appeal. The UEF also cited to a Board decision in *Estate of Joseph Hayward Parks v. Wallace Cotton*, wherein an appeal was dismissed because the claim had been filed in the name of the decedent's estate, not by his personal representative. (Claim No. 2011-00013). The Board said, "The Estate can only act through the personal representative. The Form 101 and the notice of appeal must list (the representative), in her capacity as Administratrix of the Estate of Joseph Hayward Parks, as a party...As a matter of law, the failure to name an indispensable party is a jurisdictional defect" that is fatal to the claim.

Plaintiff argues she has properly brought her claim or should be permitted to amend its caption, or style, because of the following:

- Candi McKinney signed all the forms associated with the claim, and the failure to list her as Plaintiff on the first page of the Form 101 was "clerical error."
- Other documents in the claim identify Candi McKinney as the party Plaintiff in her capacity as administratrix of her husband's estate.
- The UEF's reliance on *Parks, supra*, is misplaced because it dealt with a notice of appeal, not an original filing.
- Justice is thwarted if amendment is not allowed.
- The UEF "laid in wait" to file its motion to dismiss, and laches should

prevent it from being allowed to obtain dismissal.

- Even if the Form 101 is defective, the limitations period has not expired so the claim is subject to being refiled by Ms. McKinney, in her personal representative capacity.

Mostly for unrelated reasons, the ALJ agrees with Plaintiff that dismissal is not warranted in this case.

Findings and Conclusions

The ALJ recognizes that 803 KAR 25:010 §2(1) states, "the party making the original application for resolution of claim pursuant to KRS 342.270 or KRS 342.316 shall be designated as 'plaintiff.'" And it is true in this case that the designated "Plaintiff" on the first page of the Form 101 is the deceased, Daniel McKinney; of course, Mr. McKinney cannot present a claim. But the ALJ finds that totality of the documents filed to bring this action clearly demonstrate that it is being presented by his daughter in her capacity as the administratrix of his estate.

Besides the first page of the Form 101, the identity of the "Plaintiff" is separately provided for on page three, and under "Plaintiff's Signature," the Plaintiff is identified as "Candi McKinney as admin of Estate of Daniel R. McKinney." Ms. McKinney signs in the same manner on the Form 104 and Form 105 on the line reserved for "Plaintiff's Signature." She similarly signs the medical waiver, Form 106, under "Signature of Patient or Personal Representative." Ms. McKinney is clearly the interested party in bringing this claim, and did everything proper to

timely do so except have herself identified at both of the lines designated to identify the "Plaintiff" on the Form 101. The ALJ believes this is a harmless error. What the ALJ is permitting Plaintiff to do in this instance is amend the cover page of the Form 101 to consistently reflect the identity of the party who signed - under oath - the Form 101, plus the other accompanying forms, as "Plaintiff."

The ALJ also believes that any discrepancy in the party to be considered "Plaintiff" was rectified in Ms. McKinney's favor when the Department of Workers Claims issued three documents identifying her as Plaintiff. The first was the acknowledgement letter issued on September 2, 2014. The second was a letter issued on the same date advising of the uninsured status of the Employer. The third was the Scheduling Order issued on September 16, 2014. In all three, the style reads: "Daniel R. McKinney (DEC) Candi McKinney (Adm) v. Rotens Tree Service Uninsured Employers Fund. The DWC, therefore, recognized Mrs. McKinney's verification of the Form 101 as her being the Plaintiff in her personal representative capacity and administratively recorded her as the Plaintiff despite her omission from the first page of the Form 101.

(In the event that this finding is appealed after a final and appealable Opinion is ultimately issued, the ALJ wishes to recognize for any reviewing appellate body some confusion he helped create on the January 14, 2015, BRC Order. On that Order, "Plaintiff" was identified originally as "Daniel Ray McKinney (Dec'd) Candi McKinney (Adm)." In preparing the BRC Order, the ALJ's paralegal copied that style from Plaintiff's motion for extension of time

filed on November 10, 2014. When completing the BRC Order with counsel at the BRC, the Defendants objected to having Mrs. McKinney's name included in the caption, and since all of the other parties' filings had not included her name, the ALJ crossed out her name so as not to suggest any decision over whether or not it was proper to include her. Since Exhibit 5 of Plaintiff's motion to amend (her copy of the BRC Order) reflects no such crossing out of Ms. McKinney's name, the ALJ must have mistakenly made copies of the BRC Order for the parties before that discussion and before he crossed out Mrs. McKinney's name.)

The ALJ did not err in granting the motion to amend the Form 101 to reflect Candi McKinney, as Administratrix of the Estate of Daniel R. McKinney, is the Plaintiff. Even though the Form 101 lists Daniel Ray McKinney as the Plaintiff, the line for "plaintiff's signature" was signed by Candi McKinney in her capacity as Administratrix of the Estate of Daniel McKinney. All other documents required to be attached to the Form 101 were also signed by Candi McKinney as Administratrix. Further, because Candi McKinney signed the Form 101 as Administratrix of the Estate, upon the Commissioner's certification Roten's did not have workers' compensation insurance the CALJ's order joining the UEF as a party reflects Candi McKinney as Administratrix of the Estate is the Plaintiff.

Notably, the UEF's motion to dismiss did not raise as an argument that the claim was barred by the statute of limitations. This is consistent with the UEF's failure to file a Special Answer, pursuant to 803 KAR 25:010 Section 5(2)(d)(4)(g), asserting the running of the statute of limitations as a special defense. Therefore, pursuant to Subsection (5)(2)(d)(3), the UEF waived the running of the statute of limitations as a defense to the claim. We note the UEF later filed a special answer asserting, pursuant to KRS 342.165, that income benefits should be reduced by 15%.

The sole basis for the UEF's motion to dismiss was the failure to name an indispensable party. During the pendency of the action, the ALJ determined the record appropriately supported allowing the amendment since Candi McKinney, as Administratrix of the Estate signed the Form 101 and signed as the Plaintiff on all other documents accompanying the Form 101. Granting the Estate's motion was within the ALJ's discretion. Nothing precludes the ALJ from joining an indispensable party during the pendency of the action. Here, however, the ALJ concluded Candi McKinney, as Administratrix, was already a party in the claim, and the caption of the claim should be amended to so reflect.

The facts in this case are distinguishable from the facts in Estate of Joseph Hayward Parks v. Wallace Cotton, UEF, and Hon. Richard M. Joiner, ALJ, supra. There, the Form 101 was signed by Samantha Johnson, but her authority to sign the Form 101 was not indicated. The Form 101 did not name the personal representative of the estate as the Plaintiff. All of the deposition captions were styled "Joseph Hayward Parks, deceased, Samantha Johnson, Administratrix v. Wallace Cotton," and the BRC order was styled "Estate of Joseph Parks v. Wallace Cotton and the Uninsured Employers' Fund." The hearing order and hearing transcript refer to Samantha Johnson as the Administratrix. The Plaintiff's brief to the ALJ listed the Plaintiff as the Estate of Joseph Hayward Parks. However, during the pendency of the action, Samantha Johnson, in her capacity as the personal representative, was never joined as a party. After the ALJ dismissed the claim, a notice of appeal was filed styled "Estate of Joseph Hayward Parks v. Wallace Cotton." In the body of the notice of appeal, Samantha Johnson was never listed as the personal representative of the Estate. Accordingly, we determined since Samantha Johnson, as Administratrix of the estate, was not a party in the proceeding before the ALJ, as evidenced by the fact she was not listed as a party in the

notice of appeal, the notice of appeal was jurisdictionally defective and *sua sponte* dismissed the appeal. The caption in the notice of appeal merely listed the Estate of Joseph Hayward Parks. The proper party to file the notice of appeal was Samantha Johnson, in her capacity as the personal representative of the Estate of Joseph Hayward Parks.

Here, at the BRC, approximately a month and a half after Roten's deposition was filed in the record, the parties agreed the ALJ should first resolve the jurisdictional issue, and the UEF would subsequently file a motion to dismiss. At that time, a final hearing had not been set. Thus, the ALJ was within his discretion in overruling the motion to dismiss and sustaining the motion to amend directing the style of the claim to reflect Candi McKinney as Administratrix of the Estate as the Plaintiff. Even though the UEF asserts the ALJ allowed it to raise the statute of limitations defense, we note that in its motion to dismiss the UEF did not assert the claim was barred by the statute of limitations. In response to the Estate's motion to amend, for the first time, the UEF raised the statute of limitations as a bar to the amendment. However, a special answer was never filed affirmatively raising the defense. The only ground for dismissal of the claim was

that Candi McKinney, as Administratrix, was an indispensable party, and she had not been listed on the caption of the Form 101 as a party. Within his discretion, the ALJ appropriately concluded such failure was not a ground for dismissal of the claim since Candi McKinney, in her capacity as Administratrix of the Estate of Daniel R. McKinney, signed as the Plaintiff on the Form 101 and all accompanying documents.

The City of Danville, Kentucky, a Municipal Corporation v. Hon. Gilbert M. Wilson, Judge, Boyle Circuit Court, et al., supra, has no application here. In that case, the Plaintiffs did not join the City of Danville within the thirty day period an action could be filed against it. Consequently, the Circuit Court did not have jurisdiction and could not entertain the Plaintiff's lawsuit.

In the case *sub judice*, there is no question the claim was filed within the two year statute of limitation period against the proper parties. Even though the caption of the Form 101, when filed did not reflect Candi McKinney as Administratrix of the Estate of Daniel R. McKinney is the Plaintiff, the Form 101 and all other accompanying documents required to be filed with the Form 101 are signed by Candi McKinney as Administratrix of the Estate.

Consequently, the ALJ corrected the caption to reflect the actual Plaintiff in the claim.

Because the UEF did not file a Special Answer asserting the claim was barred due to the running of the statute of limitations, as required by the administrative regulations, it waived the defense. See 803 KAR 25:010 Section 5 (2)(d)3. Assuming, *arguendo*, it was permitted to raise the statute of limitations as a defense, we believe the claim was not barred by the statute of limitations as Candi McKinney, as Administratrix of the Estate was the actual Plaintiff at the commencement of the claim. Although the caption of the Form 101 does not list her as such, Candi McKinney was sufficiently listed on the Form 101 as a party in order to advise all other parties of the party asserting the action.

We find no abuse of discretion on the part of the ALJ in overruling the UEF's motion to dismiss and sustaining the motion to amend the Form 101. Abuse of discretion has been defined, in relation to the exercise of judicial power, as that which "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky Nat. Park Commission, ex rel. Comm., v. Russell, 301 Ky. 187, 191 S.W.2d 214 (Ky. 1945). Bullock v. Goodwill Coal Co., 214

S.W.3d 890, 893 (Ky. 2007). Here, the ALJ's actions were not arbitrary or capricious under the circumstances, and certainly his decision was not unreasonable and unfair. This is especially true in light of the fact Candi McKinney was identified as the Administratrix of Estate in the Form 101 and the accompanying documents. The ALJ's decision on this issue shall be affirmed.

On cross-appeal, the Estate asserts the ALJ's finding that Roten's did not commit a safety violation is contrary to the evidence. The Estate asserts the ALJ erroneously relied on the testimony of Jeff and Randy White ("White"), an employee of Roten's, in determining no safety violation existed. The Estate contends the testimony is replete with instances documenting Roten's failure to follow specific OSHA regulations. It maintains White's deposition testimony establishes the following violations: 29 CFR 1910.67(c)(2)(ii) only trained persons shall operate an aerial lift; 29 CFR 1910.67(c)(2)(v) "a body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift;" 29 CFR 1910.266(i)(1) "the employer shall provide training for each employee, including supervisors, at no cost to the employee;" 29 CFR

1910.266(i)(2) "Frequency;" and 29 CFR 1910.266(i)(3) "Content."¹

The Estate complains Jeff was unable to specify the safety policies he required his employees to follow. Further, his testimony provided no proof: 1) of training to ensure the employees knew what to do with the safety equipment; 2) informing his employees the equipment was in the truck to begin with; and 3) verifying the equipment was even in working order. It argues once Roten's undertook the duty to perform the work associated with the business, it had a continuing obligation to satisfy the duties imposed regardless of the source. The Estate also cites White's testimony that Roten's never required anyone to wear a safety harness while in the bucket.

The Estate also contends the deposition testimony demonstrates a violation of Roten's general duty as the four-part test set forth in Lexington-Fayette Urban County Government v. Offutt, 11 S.W.3d 598 (Ky. App. 2000) was met. The Estate asserts logging and tree removal present a number of hazards to employees who work in that field which were universally recognized in extensive OSHA regulations. The hazards were very likely to cause death or physical

¹ Frequency and Content relate to the necessary training.

harm as they did in this case; thus, Roten's had the obligation to institute safety training for its employees in order to reduce or eliminate the risks. With respect to this argument, it concludes as follows:

In his Opinion, Award and Order, the ALJ focuses on experience of Daniel R. McKinney rather than the failure of Roten's to enact any safety training or enforce any safety protocol. The ALJ noted the owner of Roten's Tree Service 'did not, and could not, always stay on the job to ensure McKinney was using the harness when he was up in the bucket.' The law does not contemplate a company's size or the owner's inability - or unwillingness - to remain at a job site. Roten's owned a duty to Mr. McKinney. It failed to meet that duty.

Finally, the Estate complains the ALJ failed to address Roten's failure to contact OSHA. It maintains 29 CFR 1904.39(a)(1) requires an employer to report the work-related death of an employee to OSHA within eight hours. The purpose of the reporting requirement is to permit a quick and timely investigation of the facts and circumstances of the event. It also allows OSHA to determine who is ultimately responsible for any potential violation which may have caused the employee's death. The Estate maintains that by violating OSHA standards, Roten's is benefitting from Jeff's dereliction of duty. Further, it posits it is easy for Jeff, three years after McKinney's

death, to testify the safety equipment was present at the time of the injury causing his death. However, had Roten's properly reported the death, OSHA would have undoubtedly performed a thorough investigation and inspection of Roten's safety equipment and training. The Estate concedes it did not have the ability to counter Jeff's self-serving testimony since McKinney is deceased. It contends Roten's should not gain an advantage by failing to comply with its statutory duties. Therefore, it argues there should be a presumption of a violation when the employer fails to report an incident. Consequently, the ALJ should have made a finding of a safety violation.

The evidence concerning this issue consists of Jeff's November 20, 2014, deposition and White's April 24, 2015, deposition. Because White's deposition provides an account of what occurred on October 3, 2012, we will discuss it first.

White testified he began working for Roten's approximately six months before the accident. McKinney had worked in the logging business for many years and knew the "tree business" very well. He and McKinney had worked as a team for Roten's but McKinney was in charge. Jeff would show them the job and what needed to be done, and they would devise a plan to get the job done. McKinney

performed the bucket work and White did the ground work which consisted primarily of chipping and sharpening saws. White acknowledged he had only been in the bucket on a couple of occasions and had never worked out of a bucket. On October 3, 2012, their job was to trim trees. The last of the trees was located in the front yard and was the worst because it was hollow and rotted. White provided the following testimony as to what occurred regarding this tree which led to McKinney's death:

A: Okay. Well, it was - I can't remember - it was a job for school township, maintenance building. It was on their property for a school. There was a bunch of trees to trim, and on the back side of the house, which he did - started that first because it was furthest away and hardest to get to.

It was a hot summer day. I don't remember - it was cooler than it had been but it was still 90s, probably, which was a break from the 100s we had been working in for a couple months.

We did all the trees that - let me think here. I have trouble putting things in order in my head, so - it was just a normal tree-trimming day. Like, it really was. It was a really good day. Like, we got a lot done that day, and that tree in the front yard, the last tree that we were doing, was the worst tree as far as - it was the easiest but the worst because it was hollow. It was rotted and punky on the outside of it and, like, we got the whole - all the limbs and brush out of

it. The trunk of the tree fought us the entire time we monkeyed with that tree.

Like, we had the notch cut in it. There's a big hole in the middle of the tree. There's about a foot of solid wood on each side and then bush on the outside of that. We notched it. The back was cut on both sides and the tree still stood there laughing at us like it was not coming down. We couldn't wedge it because the wedges were sinking into the soft wood, so we go the truck, and we pushed the trunk of the tree over with the truck. That's how the truck ended up by the log in the first place.

And the maintenance guys are there. All we had to do was the cut the log, and I think we may have made two cuts on it so they could get the wood out with their tractor, and that's what we were in the middle of doing. The log kept binding up because it was rotted wood. Wedges weren't holding, and we did use the bucket for, you know, a log boom, basically, with a chain and log tongs.

So that's what we were doing to try and put - take the weight off the log so I could make the cut all the way through and be done. We were - we were minutes from being done with the job. And let me think - I don't know. The log tongs were having trouble getting a bite on the rotted wood. Like, I was hammering the tongs in, trying to get them to bite just so we could get the cut done, and I guess the only problem I felt is that Daniel was in the bucket at the time with all that load on the chain and the boom - like, we normally used it but he would - you know, he normally wasn't in the bucket. Like,

it's an effective log boom for moving wood, but - yeah. So I don't know.

Anyway, we finally got the tongs to grab ahold, and the pressure was on it, and I was making the cut the rest of the way through, and the next thing, the tongs kick out, and I guess there was a lot of strain on the bucket, because he kind of got catapulted out of the bucket. Like, I don't know. The bucket was probably twenty feet in the air, and he shot about six feet out of the bucket and, you know, there's a log the size of this table across that I'm trying to finish my cut on, and he landed on the other side of the log. Like, you know - wasn't nothing I could do to jump across the log and try and catch him.

And he landed on his side, which I thought was a good thing, so I didn't have to move him, because if I would have him that's all I would have done, because I know that helps free your airway.

Only White and McKinney were present at that time. White acknowledged it was not normal to use the boom of the truck to move logs, but it was effective in moving logs when a log truck was not present. He explained it was easier to move a 500 to 1,000 pound log with a machine rather than using your back and knees. White testified:

Q: And was that allowed? I mean, was there a protocol that says that you can use this -

A: Yeah. Like, that - we did use it all the time for a log boom, you know, with the chain and tongs, so yeah, because we had a trailer - a dump trailer that

we load our wood with the tongs into the trailer, you know. Like, that's how we got wood off the job and stuff.

Q: And let me just ask some more questions. So the wood tongs go into the tree?

A: They're big giant steel - like a scissor thing with two big spikes on each end of it that dig. It's like a scissor, and when the points dig, the pressure pulls this way and pulls in on itself to grab the log.

Q: Okay. And -

A: Like a pair of pliers, kind of.

On that date, McKinney was in the bucket and he was cutting the logs. White admitted it was protocol to wear safety harnesses, and there were two harnesses in the truck. However, White and McKinney were not wearing the harnesses at the time of the accident. He testified Jeff advised them to use the safety harnesses, explaining as follows:

Q: Did Mr. Roten advise you to use the safety harnesses?

A: Yeah. I think every day he made a comment about the harnesses in the truck and - yeah. Yeah. And see, like I just thought of this, thinking about having to come here today to talk, like the whole thing with the trunk fighting us, like, that's how the truck ended up there.

Normally the truck - we were done chipping that day. Everything was cleaned up. We were getting this log

done and we were done. So the truck and chipper, you know, they weren't even - they wouldn't have even normally been there if that tree wouldn't have been so stubborn and fell on the damn ground like it was supposed to. The truck wouldn't have been nowhere near it. We wouldn't have needed to do what we did. But you got to improvise and get the job done, and that's what we were doing, and you know, I don't really know. It was just a freak accident.

But yeah, thinking back, I wish, you know, would have done things differently, but it was just a regular day.

Q: What would you have done differently?

A: Well, he wouldn't have been in the bucket trying to get everything done, like - you know, it was the end of the day. We were just trying to get done, and it was literally six inches of wood holding that log together and we were done. So it made sense at the time the way we did it, you know, but looking back, I wish we wouldn't have done it that way.

White characterized their actions as follows:

Q: So it allows you to use the bucket on the ground and not -

A: Yeah, without being in the bucket, yes, and it's a safety thing in case, say something happens to your climber where he's stuck up there, you can get him down. You know, it's a safety feature, is what it is.

But yeah, that's how we normally did it. But like I said, we were just trying to get done and wasn't really - it was spontaneously the way we did it,

you know. I don't know how to really put it. It was just a stupid accident, really.

White testified he and McKinney smoked marijuana at noon on their lunch break. He estimated they took "two hits of a bowl." Jeff was not aware they had smoked marijuana or that McKinney was taking any other substance. When advised of the findings in the toxicology report, White provided the following testimony:

Q: He, according to the exhibit and the toxicology report, he tested positive for benzodiazepines in his blood and THC as well as Fentanyl.

A: I know what Fentanyl is just because I broke my back before, so I'm familiar, but I had no idea Daniel was messing with Fentanyl. I never even heard him mention - like, we didn't talk about that kind of stuff, to be honest with you.

Jeff was on the job site twice on that day. White testified McKinney had never used the safety harnesses before that day. He explained because the "[tree] was notched and back cut out all the way around there was nothing to still have it standing." Consequently, they tried pushing it over using the front of the truck.

During the six months he worked for Roten's, White denied receiving any type of safety training,

including attending classes. He testified he has spent years performing tree work. White testified even though the books and manuals for the truck were in the glove box, he never read them and Jeff never told him to read them. Reviewing the manuals was not a requirement to use the truck. Jeff never required him to undergo drug testing, but he did not know if McKinney was required to undergo drug testing. Drug testing was not a requirement of White's employment with Roten's.

White estimated he worked with McKinney every day during the six months he worked for Roten's. During that time, he never used a harness and never saw McKinney use a harness. White understood anytime an individual is in the bucket, he or she is required to use a harness. He acknowledged he and McKinney had been doing tree work long enough to know common sense dictates the use of a harness. White explained tree climbers get "cocky and lazy" and do not think of little things until something happens. White testified Jeff told him all the time to wear a harness but that still did not cause him and McKinney to wear one. Jeff never docked his pay for failure to wear a harness as it was a non-issue. Jeff encouraged him to wear a harness but did not require the use of one. White testified common sense dictates what not to do in a bucket. However, Jeff

did not train him on what should or should not be done in the bucket. He explained he had worked twenty years in the business and was familiar with every piece of the business and many aspects of the job did not need an explanation.

White testified Jeff made sure they had everything they needed. White testified he had received training over the years but not by Jeff. Jeff had never afforded him an opportunity to go to a seminar.

White was unaware where Jeff was on the date of the accident. Jeff had taken them to the job and showed them the job. He testified after Jeff left the jobsite earlier that day he came back before lunch to check on them. White provided the following testimony concerning what caused McKinney to be thrown from the bucket:

Q: So based on what you saw, what caused Danny to be catapulted from the bucket?

A: Well, I mean, the cause of it was the tongs kicking off of the log with a hell of a lot of strain on the chain and boom, because we were having trouble getting the tongs to hold onto the logs. So yeah, the log - the log tongs kicked off, and it literally catapulted him, so - the tongs kicking off the log is what caused the whole accident.

White and McKinney decided to use the truck to push over the tree. He explained the motto was to do

whatever to get the job done, which meant you had to be creative sometimes. He agreed with Jeff's testimony he had told them what not to do. White testified if McKinney had worn a harness he would not have died that day. White testified Jeff had never made McKinney put on a harness before he got in the bucket.

Jeff testified he is the owner of Roten's Tree Service. McKinney started working for him around November 2011 and had been working for him on and off for a year. McKinney previously worked for him on and off for seven or eight years. White and McKinney had worked together prior to October 3, 2012. Typically, McKinney trimmed and White did the grinding. Jeff would tell McKinney what he was to do on the job. If White was on the job, he would also tell him what he was to do; if he was not there, McKinney would instruct White the job he was to perform. Jeff testified he provided training to the people who help him. He would review the workings of the chipper and encouraged his employees to wear their safety belts which are provided in the truck. He also instructed them to wear safety glasses and ear plugs which he provided. Whenever someone else worked on a job, he would brief the individual. Jeff testified he has had a training plan in place since he began the business. Jeff testified he would never use

someone on his job site whom he had never met because they had not been through his training.

The job on October 3, 2012, involved removing a dead tree located at the annex building of the Metcalfe County School System. Jeff called McKinney who was willing to work and he, White, and McKinney drove to the annex. It was McKinney who requested White work with them. Jeff testified he showed them what needed to be done explaining:

A: And also Randy White. Daniel has worked with Randy, and he had requested Randy to work with him. I took them over there and showed them what needed to be done, told them, you know, as far as taking the removal of the tree and once they got the tree laid on the ground, and I told them on what not to do.

Q: Okay.

A: And whenever I told them what not to do, because I - the next day, the date that they was finishing it up, I was on a trip with the Hart County Jailer, Keith Riordan.

Q: Okay.

A: I was with him. And I specifically told Daniel not to be lifting that log with my boom.

Q: Okay. So you - fair to say you told them how to do the work that they were -

A: Yes.

Q: Okay.

A: told him not one time, but five times, 'Do not move that log with the bucket. Cut it up.'

Jeff testified he inspected the site before starting the job. At that time, Roten's owned a C-7500 GMC bucket truck and a 1999 Silverado Z71. Jeff testified he trained everyone who worked with him regarding the bucket truck:

Q: -- the bucket truck? Tell me about that training.

A: As far as on how to operate the bucket, which, you know, Daniel has been around buckets all his life.

Q: Okay.

A: I mean he worked with me at Asplundh Tree Service, he has worked with me at Townsend Tree Service. I mean I went through the basis - the baseline -

Q: Uh-huh.

A: -- operations. I mean he done knowed [sic] it.

Jeff explained the bucket truck had two sets of controls. One set of controls was located in the bucket and the other is on the ground and is known as the dead man control. He explained if the control in the bucket does not work, the dead man is used to move the bucket.

Jeff was not on the job site when the accident occurred. The first day of the job he was at the jobsite off and on. During that time he checked to make sure they

were following his instructions. After the first day, McKinney and White used the Z71 to drive home and return to the site the next day. Jeff provided the following testimony regarding the safety measures present at the job site:

A: You know, I tell them to - just like he gets in the bucket, there's, you know, safety harnesses and everything in yonder. You know, he'll put it on occasionally; but, you know, whenever - if I'm not at the job site, you know, if he takes it off, I'm not aware of it; but it was all there.

Q: Okay. Roten's provides all of the safety equipment?

A: Yes, sir.

Q: Okay. Is there anyone other than yourself who is in charge of making sure that those safety procedures are followed?

A: No, sir.

Jeff testified he never spoke with anyone at OSHA after the injury and was unaware he was required to report a death or an injury. No one from OSHA contacted him nor had he received a report from OSHA. However, the insurance carrier sent an inspector to inspect the bucket truck. Jeff was told he passed the inspection and everything was in order.

In the August 18, 2015, Opinion and Award, concerning the Estate's claim for enhanced benefits pursuant to KRS 342.165(1), the ALJ concluded as follows:

Plaintiff's claim to a safety penalty enhancement.

KRS 342.165(1) states:

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 thereunder, communicated to the employer and relative to installation of maintenance of safety applicable or methods, the compensation for which the employer would otherwise be liable under this chapter shall be increased thirty percent (30%) in the amount of each payment...

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 (Ky. 1996). Application of the safety penalty against an employer requires proof indicating a worker's injury was caused "in any degree" by the employer's intentional violation of a specific safety statute or regulation. KRS 342.165(1). When an injured employee seeks imposition of a safety penalty for an employer's alleged violation of a specific statute or regulation, he or she must: 1) prove a violation of a safety statute or regulation; 2) establish the violation was "intentional" as defined by applicable

law; and 3) prove the accident was, in any degree, caused by the intentional violation.

In this case, Plaintiff asserts that Defendant Employer intentionally violated KRS 338.031(1), also referred to as the "general duty" clause, which provides that an employer:

(a) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(b) Shall comply with occupational safety and health standards promulgated under this chapter.

At issue in an analysis of alleged violation of the "general duty" clause are: 1) did the condition or activity present a hazard to the employee?; 2) did the employer's industry generally recognize this hazard?; 3) was the hazard likely to cause death or serious physical harm to employee?; and 4) did a feasible means exist to eliminate or reduce the hazard? See *Lexington-Fayette Urban County Government v. Offutt*, 11 SW3d 598 (Ky. App. 2000).

After careful consideration of the depositions of Jeff Roten, the owner of Roten's Tree Service, and Randy White, a former employee who was working with McKinney on the date of the accident, the ALJ finds that the Employer did not violate a safety rule and McKinney's estate is not entitled to an increase in benefits.

White testified he and McKinney both had about 20 years of experience and "knew the tree business real well." (p. 6; 57). Plaintiff's counsel kept pressing him on the training he and McKinney received from Roten; White said:

I mean, I've been a tree man for 20 years, so the job is the same no matter who you work for. It's -- trees are trees, and they all come down the same...

He (Plaintiff's attorney) keeps saying training, and I'm not really sure how to keep saying the same thing to you. We were all professional tree men, and like, training is for children and people that don't know what they're doing...I guess, is the way...I feel like I'm answering the same question different ways...

(p. 32, 59)

Asked the question again, White said, "if something was going on and needed talked about, we talked about it, but like, most day-in, day-out tree work, there's not -- it's all kind of the same." (p. 59)

White said Roten had "a real nice bucket truck and a real nice chipper," and gave them "the particulars of the equipment and stuff, but as far as the work goes, you know, I had that under control." (p. 32).

In reviewing obligations of an "employer," the ALJ recognizes that an employer is an employer, but some context is necessary in analyzing safety regulations. Roten's Tree Service is a

small, family business with no more than a couple of employees at a given time. The business of cutting trees is not complex; as White said, "trees are trees," and he and McKinney were highly experienced in the business. For example, asked if Roten had trained them on using a safety harness, White said, "Well, I mean, any time you're in the bucket you're supposed to have the harness on...Daniel had been doing tree work long enough, and I had too, that common sense tells you, you know, put his harness on, but...All tree climbers get cocky and lazy and, you know, we've lived this long so we don't think about little things until something happens." (p. 39). Roten identified the jobs for White and McKinney to do, but he did not, and could not, always stay at the job site to ensure McKinney was using the harness when he was up in the bucket.

The ALJ agrees with White that McKinney suffered a "freak accident." (p. 14). They were cutting a rotten tree, and White explained why rotten trees cause added problems. They attempted to knock it over with the front crash bar on the truck, expressly relying on their experience, without Roten's involvement, to identify that as the best method of getting the tree down. (In doing so, the tongs on the log were dislodged, causing McKinney to be catapulted out of the bucket; p. 48.) Their decision to try and knock the tree down was "spontaneous." (p. 15) "It should be on the ground but it's still standing there. You ain't really got time to do much thinking. You got to get the damn thing down before it falls and something bad happens." (p. 49). They were confronted with "just a bad bunch of events that, you know, there wasn't really another way we could have went

about it, I don't think." (p 28). The ALJ does not believe the lack of any training by Roten contributed to McKinney's unfortunate accident.

As the claimant in a workers' compensation proceeding, the Estate had the burden of proving each of the essential elements of its cause of action including entitlement to enhanced benefits pursuant to KRS 342.165(1). Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since the Estate was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

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 discretion to determine

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 (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). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

In the absence of a petition for reconsideration, concerning questions of fact, the Board is limited to a determination of whether there is substantial evidence

contained in the record to support the ALJ's conclusion. Stated otherwise, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

The Estate's argument has three subparts. First, it contends Roten's failure to require the workers to wear a safety harness while in the bucket mandates a finding there was a violation of a safety standard and imposition of the 30% penalty. In his opinion, the ALJ never addressed whether McKinney's failure to wear a harness constituted a safety violation sufficient to support an award of enhanced benefits. This is complicated by the Estate's failure to file a petition for reconsideration seeking findings of fact on this issue.

The testimony of White and Jeff unequivocally demonstrate harnesses (belts and lanyards) were available, and on numerous occasions Jeff had instructed both White and McKinney to wear the harness. However, Jeff did not disagree with White's statement he never forced them to wear the harnesses. White testified common sense dictated that a harness be used while in the bucket; however, he and

McKinney never wore the harness. White's testimony establishes that even though he and McKinney had worked for a long period of time in the tree business, they habitually refused to comply with Jeff's directions to wear the safety harnesses. Since this issue was raised and argued in the briefs to the ALJ, we believe the decision of the ALJ not to enhance the award pursuant to KRS 342.165(1) should be vacated and the claim remanded for additional findings regarding McKinney's failure to wear the safety harness.

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. If an accident is caused in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation of the commissioner or the employer for the safety of employees or the public, the compensation for which the employer would otherwise have been liable under this chapter shall be decreased fifteen percent (15%) in the amount of each payment.

On remand, the ALJ must determine whether McKinney's failure to wear a harness while in the bucket was due to Roten's failure to comply with a specific statute or regulation and whether that failure to any degree caused the accident. We offer no opinion as to the outcome on remand.

The Estate also argues Roten's failure to institute safety training for its employees and its violation of that duty mandates imposition of the 30% safety penalty.

In Chaney v. Dags Branch Coal Co., 244 S.W.3d 95, 101 (Ky. 2008), the Kentucky Supreme Court instructed:

This case does not concern a violation of KRS 338.031, KOSHA's "general duty" provision; therefore, *Cabinet for Workforce Development v. Cummins*, 950 S.W.2d 834 (Ky. 1997); *Apex Mining v. Blankenship*, 918 S.W.2d 225 (Ky. 1996); and *Lexington-Fayette Urban County Government v. Offutt*, 11 S.W.3d 598 (Ky. App. 2000), and similar authority are of limited value. KRS 342.165(1) does not require an employer's conduct to be egregious or malicious. Absent unusual circumstances such as those found in *Gibbs Automatic Moulding Co. v. Bullock*, 438 S.W.2d 793 (Ky. 1969), 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. *AIG/AIU Insurance Co. v. South Akers Mining Co., LLC*, 192 S.W.3d 687 (Ky. 2006), explains that KRS 342.165(1) is not penal in nature, although the party that pays more or receives less may well view it as such. Instead, KRS 342.165(1) gives employers and workers a financial incentive to follow safety rules without thwarting the purposes of the Act by removing them from its coverage. It serves to compensate the party that receives more or pays less for being subjected to the effects of the opponent's "intentional failure" to comply with a safety statute or regulation.

Although the Estate maintains Roten's violated the general duty provision as set forth in KRS 338.031, we conclude that statute is inapplicable. Here, the ALJ concluded Roten's failed to provide any training; thus, specific safety regulations identified by the Estate regarding the need for training were violated. The issue was whether Roten's failure to provide training in violation of the OSHA standards in any degree caused the work-related accident.

In the case *sub judice*, it appears the ALJ discerned White's testimony established Roten's had not provided any training to White and McKinney. We note White's testimony only related to the training or lack thereof provided to him by Roten's. He did not testify concerning the training McKinney received from Roten's.

However, the ALJ concluded there was a lack of training as he determined the lack of training by Roten's did not contribute to McKinney's accident.

That said, we conclude the ALJ's finding that Roten's lack of training did not contribute to McKinney's accident is supported by White's testimony. White's testimony does not unequivocally support a finding that the lack of training was the cause of this accident. Rather, the ALJ could reasonably find his testimony demonstrates the cause of the accident was McKinney's refusal to wear harnesses and the manner in which they impulsively chose to bring down the rotted tree. White acknowledged if McKinney had worn a harness, he would not have died. In addition, White also acknowledged they did not normally use the bucket truck to push over trees. White testified they improvised and acted spontaneously in "the way we did it." White testified he wished they had not proceeded as they did. White also testified tree climbers get "cocky and lazy" and do not think of the little things until something happens and characterized the event as a stupid accident. Jeff testified he told them on five occasions not to "move the log with the boom."

Since the Estate did not file a petition for reconsideration requesting additional findings of fact on

this issue, our task is to determine whether substantial evidence supports the finding that the lack of training did not contribute to McKinney's accident. In this case, the testimony of White recited herein constitutes substantial evidence establishing that a lack of training did not in any degree cause the work-related accident. We believe White's testimony firmly establishes Roten's failure to provide training did not cause the accident as he and McKinney, on their own volition, proceeded without any regard for the safety regulations of which they were clearly aware. Thus, the ALJ's finding as to this issue will be affirmed.

The Estate's third argument is that the ALJ erroneously failed to address Roten's failure to contact OSHA. We disagree. Notably, the Estate did not raise in its brief to the ALJ that it was entitled to a presumption of a violation because OSHA was not notified. Rather, it contended Roten's was estopped from asserting a safety violation on the part of McKinney because of its failure to report the accident. On appeal, the Estate asserts there should be a presumption of a violation when the employer fails to report an incident. Consequently, the ALJ should have found a safety violation. We know of no statutory or case law authority for such an argument. Consequently, we

decline to hold that in cases such as this where the employer violated the OSHA standards and failed to report an incident, imposition of a safety penalty is mandated. Since the Estate did not raise this argument before the ALJ, it has waived its right to assert it on appeal. Further, since there is no authority for imposing a safety penalty due to the employer's failure to report the accident, we decline to reverse the ALJ's decision on this ground.

Accordingly, concerning the appeal filed by the UEF, the decision of the ALJ is **AFFIRMED**. That portion of the ALJ's decision finding Roten's alleged failure to supply training as required by the administrative regulations did not contribute to the death of McKinney is **AFFIRMED**. Likewise, the ALJ's refusal to impose a safety violation due to Roten's failure to report the accident resulting in McKinney's death to the appropriate governmental agency is also **AFFIRMED**. However, the decision of the ALJ declining to enhance the death benefits is **VACATED**. This matter is **REMANDED** to the ALJ for a determination as to whether McKinney's failure to wear a harness resulted from Roten's failure to comply with a specific statute or regulation and, if so, whether that failure in any degree caused the work-related accident.

ALVEY, CHAIRMAN, CONCURS.

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

RECHTER, MEMBER. I would affirm the ALJ's opinion in total. I believe his findings regarding the alleged safety penalty are satisfactory.

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