# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: October 26, 2018**

CLAIM NO. 201475681

HARDHAT WORKFORCE SOLUTIONS, LLC — PETITIONER

VS. **APPEAL FROM HON. ROLAND CASE, ADMINISTRATIVE LAW JUDGE**

ANTHONY WARNER (DECEASED)
MELISSA MARQUEZ-WARNER
AND REGINA WILEY (CO-ADMINISTRATORS)
TITAN ELECTRIC
UNINSURED EMPLOYERS' FUND
AND HON. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE — RESPONDENTS

AND

TITAN ELECTRIC — CROSS-PETITIONER

VS.

HARDHAT WORKFORCE SOLUTIONS, LLC
ANTHONY WARNER (DECEASED)
MELISSA MARQUEZ-WARNER AND
REGINA WILEY (CO-ADMINISTRATORS)
UNINSURED EMPLOYERS' FUND — CROSS-RESPONDENTS
AND HON. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE — RESPONDENT

**OPINION & ORDER**
**DISMISSING APPEAL AND CROSS-APPEAL**
* * * * * *

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

**STIVERS, Member.** HardHat Workforce Solutions, LLC ("HardHat")[1] appeals and Titan Electric ("Titan") cross-appeals from the February 13, 2017, Opinion on Remand and the May 14, 2018, Order of Hon. Roland Case, Administrative Law Judge ("ALJ"). In the February 13, 2017, Opinion, the ALJ determined Anthony Warner ("Warner") (deceased) "was obviously an employee" of both Titan and HardHat at the time of his death; therefore, both are jointly and severally liable for the workers' compensation death benefits awarded by Hon. William Rudloff, Administrative Law Judge ("ALJ Rudloff"), in an Opinion and Order dated May 12, 2015. *Importantly, the ALJ failed to enter an award.* In the May 14, 2018, Order, the ALJ clarified he considers Warner to be a "joint employee" of both Titan and HardHat at the time of his death.[2]

On appeal, HardHat asserts the ALJ's finding of joint and several liability is erroneous. HardHat also asserts the ALJ failed to make adequate findings of fact to apprise the parties of the basis of his decision regarding joint liability. On cross-appeal, Titan asserts the ALJ's decision to find both parties jointly liable should be upheld; however, should the Board find only one party liable, that party should be HardHat.

In the Board's Opinion entered February 12, 2016, we set forth the following summary adopted herein in full:

> The administrators for Warner's estate filed a Form 101 on October 10, 2014 alleging Warner fell into

[1] HardHat has been spelled many ways throughout the litigation. We choose to use the spelling predominantly used by HardHat in its brief to this Board which is HardHat.

[2] The finding Warner was a "joint employee" of Titan and HardHat is in contrast to a finding Warner was a "dual employee" which is a separate and distinct legal term of art.

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 [sic] 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, [sic] 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 Hat, 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 [sic] 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.
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> 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.

In the previous appeal to this Board, Titan asserted ALJ Rudloff's analysis was deficient as a matter of law. In affirming in part, vacating in part, and remanding for additional findings, this Board held as follows:

> 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 [sic] 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.

In the February 13, 2017, Opinion on Remand, in finding Titan and HardHat are jointly and severally liable, the ALJ set forth the following findings:

> This claim is on remand from the Workers' Compensation Board. The original Administrative Law Judge cited in his decision *Uninsured Employers Fund v. Garland, 805 S.W. 2d 116 (Ky 1991)* and *Ralha v. Medical Center, 2014 WL 14002 (Ky. App. 2014.)* However, the undersigned ALJ finds both of these cases to not be relevant to the case before him. *Garland, supra* involved a question of whether the worker was an independent contractor or an employee. *Ralha supra* concerned an injury occurring during the application process. Neither of these cases are applicable to the instant case.
>
> The ALJ has reviewed the entirety of the record including medical evidence and testimony transcripts. The ALJ would note the defendant, Titan, filed an eighteen page brief to the ALJ on remand and did not cite

a single case. Counsel for the defendant, Hard Hat Workforce, also filed a twenty-two page brief without citing a single case. The ALJ is not being critical of counsel for either defendant but merely is pointing out that there is obviously no relevant case law concerning the issue before the ALJ at this time.

The Administrative Law Judge has reviewed the entirety of the record including medical evidence and testimony transcripts. The ALJ notes the application completed by the plaintiff, Mr. Warner, was a Hard Hat application with Hard Hat listed as the employer on the post-offer medical questionnaire and the employee's withholding allowance certificate as well as the direct deposit agreement and the employee handbook. The ALJ notes the plaintiff's widow testified he related to her he had been hired by "the temp company" for "a couple of weeks." Titan is not a temporary service company. The account application introduced during Mr. Bowling's testimony indicated Hard Hat was responsible for all workers' tax withholdings, payment of time and a half for overtime, unemployment insurance and workers' compensation with Titan to be "solely responsible for directing the Hard Hat employees on site activities and retain full control over the means and methods of work at the job site."

It is obvious that the deceased worker was on the job site at the request of the defendant, Titan Electric, and was under the supervision of Titan Electric. The work being performed was for the benefit of Titan Electric. On the other hand it is equally clear that the defendants, Titan Electric and Hard Hat Workforce, were operating under an unwritten arrangement. It seems clear that Titan Electric intended for the decedent to be an employee of the defendant, Hard Hat Workforce. Superficially, the facts would indicate the decedent, Anthony Warner, had all the attributes of being an employee of Titan Electric. However, the evidence would indicate that based on past dealings the parties intended for Anthony Warner to be an employee of Hard Hat Workforce. It appears, based upon the unwritten arrangement, that Hard Hat Workforce was to provide workers' compensation for the employees of Titan Electric and was also responsible for the payroll. However, at the time of Anthony Warner's death, Hard Hat had not even received the application.

> The account application indicates Hard Hat was to be responsible for all workers' tax withholdings, payment of time and a half for overtime work, unemployment insurance and workers' compensation with Titan Electric to be solely responsible for directing the onsite activities and to retain full control over the means and methods of work at the job site.
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> Counsel for the defendant, Titan Electric, makes a very plausible argument that Anthony Warner was an employee of Hard Hat Workforce. Counsel for Hard Hat Workforce makes a very plausible argument that Anthony Warner was an employee of Titan Electric. The "fly in the ointment" in this case is that the parties were operating under an unwritten arrangement. The situation in this case was foreseeable that someone would be injured before the completion of the vetting or application process. This should have been covered by a written agreement. The defendants, Titan Electric and Hard Hat Workforce, brought this situation on themselves by not having a written agreement. The ALJ, after reviewing the evidence multiple times, is persuaded that Anthony Warner was an employee of both Titan Electric and Hard Hat Workforce at the time of his death. Anthony Warner was obviously an employee at the time of his death and both Titan Electric and Hard Hat Workforce had characteristics of being the employer. The ALJ therefore finds Anthony Warner was an employee of both Titan Electric and Hard Hat Workforce and they are jointly and severally liable for the workers' compensation benefits awarded in this case. Quite simply, the parties by not having a written agreement and no clear understanding as to the arrangement both will be found to be employers and jointly and severally liable.

*Importantly, the ALJ failed to enter an award of any kind against Titan and HardHat.*

HardHat filed a petition for reconsideration asserting several errors, including the error of finding joint and several liability. HardHat requested additional findings on the issue of joint and several liability.

In the May 14, 2018, Order, the ALJ set forth the following additional findings:

> The above claim comes before the undersigned Administrative Law Judge on Petition for Reconsideration field by the defendant, Hard Hat. Having considered Petition for Reconsideration, the response thereto and the record herein, it is considered and ordered the Petition for Reconsideration is Overruled. The Petition for Reconsideration is essentially a re-argument of the claim on its merits.
>
> Initially the Administrative Law Judge would recognize he was mistaken in indicating the defendants did not cite a single case. The ALJ intended this statement to not reflect on counsel but to the fact that there are no particularly relevant cases concerning the fact situation in this claim. However, the ALJ has reviewed the cases cited by the defendant, Hard Hat, in their brief. In Island Creek Coal Company v Wells, 113 SW3d 100, 104 (Ky 2003), the Court held that in determining the intention of the parties in regards to the contract the Court shall "consider the subject matter of the contract, the situation of the parties and the conditions under which the contract was written, by examining extrinsic evidence as to the parties' intentions."
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> Additionally, in Frear v PTA Industries, Inc. 103 SW3d 99, 106 (KY 2003) the Court indicated, "the contract's terms will be interpreted by assigning language its ordinary meaning and without resort to extrinsic evidence" in the absence of ambiguity. In Cantrell Supply, Inc. v. Liberty Mutual Insurance Company, 94 SW3d 381, 385 (KY App 2002), the Court held "a contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations."
>
> The ALJ has reviewed the cases cited by Hard Hat and does not find them persuasive to the case at hand. The ALJ has again reviewed the evidence of record and considered the briefs of the parties as well as the Opinion of the Workers' Compensation Board on multiple occasions. The ALJ has found no cases which would specifically apply to the fact situation in the case at hand. However, the ALJ reviewed the decision in Harold

Wagers v Sandhill Processing, et al, claim numbers 96-07954 and 96-07238. In that claim the Workers' Compensation Board in an Opinion rendered October 23, 1998 affirmed ALJ Lloyd Edens in a case wherein ALJ Edens found at the time of the accident in question the worker was performing services for both employers and accordingly the ALJ held that the defendants were jointly and severally liable for the workers' compensation benefits awarded to the injured worker. In that case, the ALJ held both employers liable under a theory of either duel [sic] employment or joint employment. The Board noted the evidence in connection with employment was conflicting but the ALJ made reasonable inferences from the evidence in reaching a decision of joint liability based upon joint employment. The Board ultimately affirmed the decision of the ALJ finding no error.

The ALJ reviewed all the evidence of record and would specifically note that the account application introduced during the testimony of Mr. Bowling indicates Hard Hat was responsible for all worker's tax withholdings, payment of time and a half for overtime and unemployment insurance as well as workers' compensation coverage with Titan to be "solely responsible for directing the Hard Hat employee's on site activities and retain full control over the means and methods of work at the job site. Considering the record as a whole the ALJ remains persuaded the plaintiff, Anthony Warner, was a joint employee of both Titan Electric and Hard Hat Workforce and therefore the defendants are jointly and severally liable for the workers' compensation benefits awarded herein. The ALJ would again note that the situation in this case was created by the defendant's not having a clear written agreement and no clear understanding as to the arrangements. Under the fact situation herein, the ALJ remains persuaded that Titan Electric and Hard Hat Workforce are jointly and severally liable for the workers' compensation benefits awarded.

For the above reasons the Petition for Reconsideration field [sic] by the defendant, Hard Hat, is overruled.

As the ALJ failed to enter an award in the February 13, 2017, Order on Remand, the Order on Remand and the May 14, 2018, Order are not final and appealable orders.

This Board, in its February 12, 2016, Opinion, vacated ALJ Rudloff's finding Titan was Warner's employer and remanded the claim for additional analysis. In Hampton v. Flav-O-Rich Dairies, 489 S.W.3d 230, 234 (Ky. 2016), the Kentucky Supreme Court explained:

> Next, we note that, when the Board vacates an ALJ's opinion, it "nullif[ies] or cancel[s]; make[s] void; invalidate[s]" that opinion. Black's Law Dictionary (10th ed.2014). When the Board vacated the ALJ's opinion, that opinion ceased to exist, and Hammond was divested of his permanent total disability award. Therefore, under what we believe to be the proper test from *Davis,* the Board's opinion was final and appealable.

Consequently, by vacating ALJ Rudloff's finding Titan was Warner's employer at the time of his death, the May 12, 2015, Opinion and Order of ALJ Rudloff and the Orders on petition for reconsideration dated July 21, 2015, August 24, 2015, and September 25, 2015, "ceased to exist," and the award of maximum death benefits in accordance with KRS 342.750, including imposition of the 30% enhancement of the income benefits pursuant to KRS 342.165(1), was rendered null and void. We emphasize that in our February 12, 2016, decision, we only affirmed the ALJ's decision to admit an OSHA report. Since the determination Titan was Warner's employer was vacated, and since we directed no particular result on remand, logically the award against Titan was also vacated, as there can be no award absent a liable party or parties. As a matter of law, then, the ALJ's February 13, 2017, Opinion on Remand was interlocutory and therefore is not final and appealable.

803 KAR 25:010, § 21(2)(a), provides as follows: "[w]ithin thirty (30) days of the date of a final award, order or decision rendered by an administrative law judge pursuant to KRS 342.275(2) is filed, any party aggrieved by that award, order or decision may file a notice of appeal to the Workers' Compensation Board." 803 KAR 25:010, § 21(2)(b) defines a final award, order or decision as follows: "[a]s used in this section, a final award, order or decision shall be determined in accordance with Civil Rule 54.02(1) and (2)."

Civil Rule 54.02(1) and (2) state as follows:

> (1) When more than one claim for relief is presented in an action, . . . the court may grant a final judgment upon one or more but less than all the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.
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> (2) When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

Hence, an order of an ALJ is appealable only if: 1) it terminates the action itself; 2) acts to decide all matters litigated by the parties; and, 3) operates to determine all the rights of the parties so as to divest the ALJ of authority. *Cf.* KI USA

Corp. v. Hall, 3 S.W.3d 355 (Ky. 1999); Ramada Inn v. Thomas, 892 S.W.2d 593 (Ky. 1995); Transit Authority of River City v. Saling, 774 S.W.2d 468 (Ky. App. 1980).

The ALJ's February 13, 2017, Opinion on Remand and May 14, 2018, Order meet none of these requirements. The ALJ's orders do not operate to terminate the action itself. Moreover, the ALJ's orders do not act to finally decide all outstanding issues, nor do they operate to determine all rights of the estate, the widow, Warner's children, Titan, and HardHat so as to divest the ALJ once and for all of authority to decide the overall merits of the case. Instead, the ALJ has yet to decide several potential issues involving the claims of the widow, Warner's children, and the estate for income benefits and death benefits, under KRS 342.750. The ALJ must also determine whether those benefits will be enhanced pursuant to KRS 342.165(1), as ALJ Rudloff's imposition of the 30% enhancement was rendered null and void. Therefore, the February 13, 2017, decision and subsequent order on the petition for reconsideration issued May 14, 2018, must be deemed interlocutory, and it is the ALJ, and not this Board who retains jurisdiction. *See* KRS 342.275.

That said, while this Board is fully cognizant of the fact that it lacks jurisdiction, for the sake of judicial economy we are compelled to offer guidance on the issue of joint employment and the safety penalty as it pertains to HardHat's potential liability. *It is critical to note the ALJ has the ability to re-examine his finding of joint and several liability in his final opinion, order, and award, as that finding has not been memorialized in a final order and award.*

The case of Integrated Electrical and Datacom v. Hussey, 2008 WL 5051632, rendered November 26, 2008, Not To Be Published, offers insight into what

defines "joint employment" within the context of Kentucky workers' compensation law. In Hussey, supra, the ALJ found the claimant was jointly employed by both Integrated Electrical and Datacom ("Integrated") and Elliot Electric ("Elliot") and apportioned liability equally between the two. The claimant had worked for Integrated from 1997 through June 1, 2004, the day its sale to Elliot was to become final. On May 26, 2004, after the claimant had passed a drug test conducted by Elliot, he was injured during an orientation meeting in which he was learning about Elliot's rules and benefits. The Board and Court of Appeals affirmed the ALJ's finding of joint employment. In affirming the Court of Appeals, the Supreme Court defined "joint employment" by citing to Professor Arthur Larson's treatise on workers' compensation:

> Arthur Larson 8b Lex K. Larson, *Larson's Workers' Compensation Law* § 68 (2008), addresses the concepts of joint and dual employment. It explains ***that joint employment occurs when an employee is under contract to two employers, under their simultaneous control, and performing the same or closely-related services simultaneously for both.*** In such a case, both employers are liable for an injury that results from the employment.

Slip Op. at 3. (emphasis added).

As held by the Supreme Court, "where two employers have a contract of hire with an injured worker, a mutual business interest, and some element of joint control over the work performed at the time of injury, the injury may be viewed as being within the course and scope of both employments." Slip Op. at 3. The Court discussed the evidence informing its ultimate decision:

> Although the claimant was employed by Integrated and received his paycheck from Integrated at the time of the injury, he had passed Elliot's required drug test and had

> been offered and accepted employment with Elliot. He was injured while attending an orientation meeting at Elliot's office to complete payroll forms; receive information concerning Elliot's safety rules, insurance, and other company benefits; and receive safety equipment. Although the employment was not to begin formally until June 1, 2004, the ALJ viewed him reasonably as being employed by Elliot as well as by Integrated on the date of the injury. [footnote omitted].

Slip Op. at 4.

Therefore, any finding of "joint employment" must satisfy the three-part test articulated in Hussey: an employee is under contract with two employers; under their simultaneous control; and performing the same or closely-related services simultaneously for both. If the ALJ is unable to find evidence in the record satisfying all three factors, he must determine if either Titan or HardHat is liable but not both.[3]

In the May 14, 2018, Order, the ALJ cited the Board opinion, Harold Wagers v. Sandhill Energy, Inc., Claim Nos. 1996-07954 and 1996-07238, rendered October 23, 1998, as allegedly lending support for a finding of joint employment. In Wagers, supra, the ALJ determined the claimant was acting in the course and scope of his employment with both Sandhill Energy and Sandhill Processing at the time of

[3] We note the facts of this case are distinguishable from those in a decision rendered previously by this Board in Kentucky Employers' Mutual Insurance v. Patricia Ahart; et al., Claim No. 2013-0137 (December 18, 2017). That claim involved the relationship between an employee leasing company and its client, a restaurant. There, the owner was employed by the leasing company and was given authority to hire employees to staff the restaurant. In this case, Titan was not given the same authority. Although Titan could identify potential candidates for employment, they were not hired until accepted by Hardhat. It is undisputed Warner died prior to Titan sending the application to Hardhat, so it was unable to proceed with consideration of Warner's employment. We also note that, in at least one instance, Hardhat rejected an individual which Titan had referred for employment and who had actually started working due to failing his background check. Notably, Titan has employees which are not employed by Hardhat, and it maintains its own workers' compensation insurance policy. In Ahart, the leasing company employed all of the employees, including the restaurant owner.

his injury. However, there are several important distinctions that can be made from the case *sub judice*, including but not limited to the following:

- Sandhill Energy and Sandhill Processing were under the same ownership.
- Sandhill Energy and Sandhill Processing shared the same building.
- At the time of his injury, the claimant was simultaneously working as a coal tipple foreman for Sandhill Processing and running errands and obtaining parts for Sandhill Energy.

These distinctions must be considered on remand.

Should the ALJ, in a final opinion, order, and award, impose the 30% enhancement pursuant to KRS 342.165(1) and find HardHat is liable in full or in part, the 30% enhancement with respect to HardHat must be examined in the context of Jones v. Aerotek Staffing, 303 S.W.3d 488 (Ky. 2010).

Finally, we must advise the ALJ that all of the indispensable parties to the action are not parties in this claim. Our review of the record reveals the action was filed in the name of Anthony Warner by Melissa Marquez-Warner and Regina Wiley as co-administrators.[4] The widow, Marquez-Warner, was not named individually as a party. The estate was not named as a party. Further, the Form 101 filed October 10, 2014, reflects that at the time of his death Warner had four children: Esabelle Marquez-Warner, Xavier Marquez-Warner, Olivia Marquez-Warner, and Abagail Marquez Warner, but only Abagail Marquez-Warner through her next friend/guardian, Randi

[4] Their title is administratrix.

Vibbert, was named as a party. However, it appears Randi Vibbert was not served with many pertinent pleadings and orders after she was joined in the litigation.

Significantly, on December 12, 2014, Titan filed a motion to join indispensable parties noting as follows:

> Decedent Warner's Form 101/Application lists the Plaintiff "Anthony B. Warner, II." The estate of Mr. Warner is not listed as Plaintiff, nor are what apparently are the co-administratixes of the estate, purportedly to be the surviving spouse, Melissa Marquez-Warner, and the mother in law, Regina Wiley. See Certificate of Qualification from the Jefferson District Court probate division, attached as an exhibit to the Form 101).
>
> The listed dependents on the Form 101 are four children, to wit: Esabelle Marquez-Warner; Xavier Marquez-Warner; Olivia Marquez-Warner; & Abagail Marquez-Warner. It is believed by counsel that the birth date shown on the Form 101 for Abagail is incorrect (likely a typographical error), as such birth date is shown as 1/26/14, while the birth certificate attached to the Form 101 shows a birth date of 1/26/04.
>
> Per information received by undersigned counsel from counsel for Plaintiff, said counsel is apparently ONLY Melissa Marquez-Warner (surviving spouse) and three of the children, Esabelle, Xavier, and Olivia; counsel has specifically stated that he is NOT formally representing Abagail, who by her birth certificate is now ten years old, and per information from Plaintiff's counsel resides with her mother Randi Vibbert, at 322 London Square, Mt. Washington, KY 40047.

In response, on December 30, 2014, ALJ Rudloff entered an Order only naming Abagail Warner as a party by stating "On Motion by defendant Titan Electric, Abigail [sic] Warner is named herein as an indispensable party."

In response to the December 30, 2014, Order, on January 6, 2015, Titan filed a supplemental motion stating that, out of an abundance of caution, to ensure all parties are properly before the Court, it was supplementing its original motion by

formally requesting that a parent or guardian of Abagail Warner, specifically Randi Vibbert, be officially and formally joined as a party to the claim. Randi Vibbert, as next friend/guardian, was not joined as party until entry of the July 21, 2015, Opinion and Order on Reconsideration. However, as noted, it appears Randi Vibbert in her capacity as next friend/guardian was not served with many pleadings and orders following her joinder. ALJ Rudloff did not serve Randi Vibbert with a copy of the July 21, 2015, Order joining her as a party nor was she served with this Board's February 12, 2016, Opinion. Further, Randi Vibbert, in her fiduciary capacity, was not named as a party in this appeal and cross-appeal.[5]

In addition, the three remaining children of the decedent have not been named as parties to this action. It appears from the record that Regina Wiley, Melissa Marquez-Warner's mother-in-law, has custody of at least one of the three remaining children. Thus, Regina Wiley should have been named as the guardian or next friend of all children for which she is the legal custodian. That was not done.

We note that in a July 21, 2015, Opinion and Order on Reconsideration, ALJ Rudloff awarded income benefits to the widow and to the children. However, he did not enter an award to the estate. In an August 24, 2015, Opinion and Order on Reconsideration, ALJ Rudloff entered an amended award regarding the benefits to which the widow and children were entitled and directed a lump sum payment be paid to the estate. In an August 25, 2015, Order, ALJ Rudloff amended the amount of the lump sum payment to be paid to the decedent's estate. In spite of these awards, neither

[5] We note that although Randi Vibbert was not named a party in either the appeal or cross-appeal, she was served with a copy of the cross-appeal.

the widow, the estate, nor three of the four children have been joined as parties in this claim. As pointed out by Titan, their joinder as parties is mandatory.

To summarize, at no point in the litigation have three of the four minor children of the decedent been named as parties through a guardian or next friend in this action. Randi Vibbert, next friend/guardian of Abagail Warner, while named as a party, has not been served with many pleadings and orders in this litigation. Further, the widow, Melissa Marquez-Warner, has not been named as a party to the action. Finally, although the action was filed in the name of the co-administrators, there is nothing delineating the Estate of Anthony Warner as a party. Thus, on remand, the ALJ shall entertain the appropriate motion to join the appropriate parties as spelled out herein before an award is entered. The parties and the ALJ shall also allow Randi Vibbert to participate in this litigation by serving her with all subsequent pleadings and orders.

Accordingly, as the February 13, 2017, Opinion on Remand and the May 14, 2018, Order are not final and appealable order, it is ordered HardHat's appeal and Titan's cross-appeal are **DISMISSED**.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

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FRANKLIN A. STIVERS
WORKERS' COMPENSATION BOARD

**DISTRIBUTION:** **METHOD**

**COUNSEL FOR PETITIONER:**

HON ANTHONY K FINALDI LMS
614 W MAIN ST STE 5500
LOUISVILLE KY 40202

**COUNSEL FOR RESPONDENT:**

HON STEVEN D GOODRUM LMS
771 CORPORATE DR STE 101
LEXINGTON KY 40503

**COUNSEL FOR RESPONDENT:**

HON THOMAS JONES LMS
4965 US HWY 42 STE 1000
LOUISVILLE KY 40222

**COUNSEL FOR UEF:**

HON WILL JONES LMS
1024 CAPITAL CENTER DR STE 200
FRANKFORT KY 40601

**RESPONDENT:**

RANDI VIBBERT USPS
322 LONDON SQUARE
MT WASHINGTON KY 40047

**ADMINISTRATIVE LAW JUDGE:**

HON ROLAND CASE LMS
657 CHAMBERLIN AVE
FRANKFORT KY 40601