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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002135-WC

LOUISVILLE METRO GOVERNMENT APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-06-75357

DEBRA HUNTER, ADMINISTRATRIX OF THE ESTATE OF JOHN HUNTER; JAMES L. KERR, ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; SHAKE,[1] SENIOR JUDGE.

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

NICKELL, JUDGE: Louisville Metro Government (LMG) petitions for review of an opinion of the Workers' Compensation Board (Board) entered on October 27, 2010, reversing and remanding an opinion and order of the Administrative Law Judge (ALJ) which assessed a fifteen percent penalty against a deceased employee for a safety violation under KRS 342.165(1).[2] The sole question on review is whether imposition of the safety violation penalty against John Hunter was supported by substantial evidence. Underlying issues are whether: (1) LMG made safety equipment available to Hunter; (2) Hunter received training apprising him of the location, importance and use of safety equipment; and (3) LMG enforced its safety procedures. Following review of the record, the briefs and the law, we conclude the ALJ's imposition of the safety violation penalty was not supported by substantial evidence and affirm the Board.

FACTS

Hunter fell from the bucket of a bucket truck while hanging banners as an employee of LMG's Signs and Marking Division. Hunter, a fifteen-year employee, had asked the driver of the truck to move the vehicle so he could

[2] KRS 342.165(1) reads, "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."

complete his task. While the truck was in motion and the boom was partially extended, it struck the bottom of a pedway and Hunter fell to the ground, a distance of about seventeen feet. When he fell, Hunter was not wearing the OSHA[3] required safety harness and lanyard. He died five days later from a closed head wound.

Rick Pearcy, a safety compliance officer with Kentucky OSHA, investigated the accident. To explain the facts leading to the accident, we quote liberally from his written report which is included in the record. His investigation began with A. Dan Curtis, LMG's manager of traffic operations, who described the incident as follows:

> The section doing the hanging of the banners was Signs and Marking Section. He stated that [Hunter] was hanging banners on the pedway which is located on Muhammad Ali Boulevard, between third (sic) and fourth (sic) streets (sic). [Hunter] was in the bucket of an aerial lift truck and was not wearing a safety harness and lanyard attached to the bucket of the lift. When asked by CSHO Pearcy if harnesses and lanyards were available and required to be worn, Mr. Curtis said the policy required a safety harness and lanyard to be worn when in a bucket truck. He also said that there was one harness and lanyard kept in the shop, located at Lexington and Payne streets (sic).
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> . . .
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> Mr. Curtis said that whenever Signs and Marking needed to hang banners, they would borrow a bucket truck from Electrical Maintenance Section located at 636 East Gray Street. It was the responsibility of the driver to get the harness from the shop at Lexington street (sic) and wear

[3] Occupational Safety and Health Administration, Department of Labor.

it. He also said he didn't think this was being done. When asked about training given to employees, Mr. Curtis said he was not aware of what had been done and how enforcement was being accomplished. Mr. Curtis gave CSHO Pearcy the names of [Hunter] and the name of the driver of the second truck at the site. The second truck was taken to the site to provide traffic control by parking at the front of the bucket truck in the direction of the traffic flow. This driver was the one who moved the bucket truck out of which [Hunter] fell.

. . .

Upon arriving at the Metro OSHA office, CSHO Pearcy met Lisa Hornig, OSHA Supervisor, Mike Stephenson, OSHA Specialist and Bobby Montgomery, Safety, Public Works. . . . The statements made by Mr. Dan Curtis were verified by Lisa Hornig. . . . During this Opening Conference, training issues were discussed, 300 Injury and Illness records were reviewed and copied, written programs were reviewed and other related records were also reviewed. . . . Based on the statements of Lisa Hornig, Mike Stephenson and Bobby Montgomery, and after review of the training records, it was determined that training had not been given for the use of safety harnesses and lanyards by the Department of Public Works. Other training had been given and was verified by written records.

. . .

The union president stated that no training had been done relative to safety items, particularly the use of safety harnesses and lanyards in bucket trucks, since the merger of city and county governments. She also stated that general safety enforcement has not been good. In discussing the accident and [Hunter], she stated that a safety harness and lanyard was in the Signs and Marking shop on Lexington and Payne streets (sic) but no training had been done on how and when to use it. The enforcement of its use was not done. Sheila did state that Electrical Maintenance on Gray Street enforced the use of safety harnesses while operating bucket trucks. Signs and Marking borrowed a bucket truck from Electrical

Maintenance when needed, but a harness was not supplied in the truck. Each electrical maintenance person had their own harness and other safety equipment in individual equipment bags which they were required to take to each job site. They also have a site foreman who made sure harnesses were worn as well as other safety equipment. If any employee showed up on the job or started to work without it, the foreman would not allow them to work until they put the safety equipment on. The union president stated that no such program existed with Signs and Marking. She said that no one insisted or checked employees when they left the shop in a bucket truck and no on-site supervision was provided by Signs and Marking. The union president also stated that the driver of the second truck on site had been suspended pending an investigation into the accident.

. . .

[Pearcy and the union president interviewed the driver of the second truck] who was working with [Hunter] when the accident occurred. This employee stated that he/she was asked by [Hunter], who was in the raised bucket of the truck, to move the truck so that the banner being hung could be attached to the pedway. Verbal communication was done between the two employees. Employee #1 stated that [Hunter] had lowered the bucket one extension and that he/she did not actually see [Hunter] in the bucket. Employee #1 stated he/she moved the truck slowly and at that time, [Hunter] fell to the street. Employee #1 stated that the truck and boom assembly moved smoothly without jerking.

During the discussion, employee #1 stated that he/she had received no training regarding the use of safety harnesses and lanyards, or when to use them. According to his/her statement, [Hunter] had received no training either. This employee also stated that no foreperson was on site to ensure that proper safety procedures were followed and that this was a common occurrence with all jobs.

On October 9, 2006, CSHO Pearcy and the union president went to Metro Public Works, Electrical Maintenance, 636 E. Gray Street. Employee #2 stated that they had received training on how and when to use safety harnesses and that each employee in Electrical Maintenance had their own safety equipment including harnesses in an equipment bag. The bag was taken anytime an employee went to a job site. The employees of the Electrical Maintenance Department stated that the use of harnesses was required while working in bucket trucks. Employee #2 also stated that a job foreperson is assigned to each job site and they enforce the safety rules, including the wearing of harnesses. If any employee shows up for work without their equipment, they are sent to the garage to get it. No one is allowed to work without using the appropriate safety equipment. Employees #3, #4, #5 verified the above statements.

. . .

Over the next few days, several other Metro Public Works employees were interviewed and every one stated that no training had been given regarding the use of safety harnesses while working in a bucket truck. Lisa Hornig and Mike Stephenson of Metro OSHA, both stated that training of Public Works employees in the use of harnesses and requiring them to be used, had not been done.

On October 1, 2006, CSHO Pearcy and the AFSCME Union President [interviewed employees in the Signs and Marking Shop]. [Employee #13] verified the facts that no training had been done on many things, particularly safety harnesses and lanyards. . . . These employee interviews verified the statements that training had not been done since merger and before that. No training on safety harnesses and the wearing of same was ever conducted. The employees did state that training was conducted concerning the operation of the bucket truck itself, but nothing was given for harnesses. There was one harness and lanyard in the shop which was supposed to have been taken to a job site by the driver of

> the truck. According to interviews, this was not enforced.
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> . . .
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> On November 1, 2006, during a return trip to the Lexington Road shop, to further talk with employees, it was learned that safety harness training had been done on October 23, 2006 by DBI Sala company (sic). CSHO Pearcy called Lisa Hornig at Metro OSHA to verify this. She stated that training had been done on that date by DBI Sala. Further training was going to be done.
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> [During a closing conference held on November 15, 2006, it] was stated that a citation for the lack of training dealing with a bucket truck and safety harnesses and lanyards was going to be recommended. Also, a citation for employees not wearing safety harnesses or body belts while in a (sic) the bucket of a bucket truck was also going to be recommended.

As alluded to in Pearcy's written report, LMG was cited by KOSHA for two "serious" violations. The first was a violation of 29 CFR 1910.67(c)(2)(ii)[4] for allowing untrained persons to operate an aerial lift. The second was a violation of 29 CFR 1910.67(c)(2)(v)[5] for allowing an employee to work from an aerial lift without wearing a body belt and being attached to the bucket by a lanyard. A $4,500.00 penalty was proposed for each violation but they were merged for a total fine of $4,500.00. LMG paid the fine, launched a training program, and purchased additional safety equipment. No OSHA violations were assessed against Hunter.

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[4] "Only trained persons shall operate an aerial lift."

[5] "A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift."

Pearcy's subsequent deposition echoed his written report. He specifically stated that during interviews with management, no one said the use of harnesses and lanyards was required or enforced. While the issue was occasionally raised, no one in a management position said the employees in the Signs and Marking Shop received in-depth training in the use of harnesses and lanyards and mandatory use of such equipment was not enforced. Pearcy testified that there was no enforcement of the policy that the driver of a bucket truck put the harness in the vehicle and wear the harness while on the job site. Both Pearcy's report and deposition were admitted into evidence without objection.

Hunter filed a Form 101, Application for Resolution of a Claim, with the Department of Workers' Claims. The claim was bifurcated to allow the ALJ to decide whether it was appropriate to assess penalties against LMG and Hunter for failure to adhere to safety regulations. On October 26, 2009, the ALJ issued a nine-page opinion in which he assessed a thirty percent penalty against LMG and a fifteen percent penalty against Hunter for the following reasons:

> 11. Addressing the relevant facts again, the plaintiff was in a bucket truck 17 feet above the ground and was not wearing a safety harness or lanyard as is required by OSHA regulations. In addition, the city kept only one harness for the entire department in the shop. In addition, it is clear that the person who moved the truck was untrained or insufficiently trained to operate the truck. To the undersigned, it is also clear that there was inadequate safety equipment provided by the city with only one harness available at the shop. It is further apparent that the operator of the truck lacked sufficient training to protect Mr. Hunter's life. While the enhanced award requires an intentional failure of an employer to

comply with a specific statute or administrative regulation, it is further apparent that intent may be inferred from the failure to comply with a specific safety statute or regulation. *Chaney v. Dags Branch Coal Company,* 244 [S.W.3d] 95 (Ky. 2006). There is sufficient evidence here to conclude that the defendant-employer knew of the OSHA regulations which were violated and that the Metro Government's conduct was sufficient to infer intent from the failure to comply with the statute. Accordingly the Administrative Law Judge finds that the employer should be assessed a 30% safety penalty to be applied to the compensation awarded.

12. KRS 432.165 also allows a 15% reduction in an award 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 otherwise obey any order or administrative regulation. The Administrative Law Judge believes that the deposition of Bobby Montgomery establishes that the plaintiff had received safety training on April 28 and April 29, 2003 by Rob Rollins with the specific topics to be chain saws, bucket trucks, and harnesses among other topics. While it is evident that no training was provided from 2003 until Mr. Hunter's death in 2006, as Mr. Montgomery said, once one has been trained to use a harness and a lanyard in the bucket truck, there is really no need for retraining. The Administrative Law Judge believes that Mr. Hunter actually erred in two different ways on September 25, 2006. First, he failed to secure himself into the bucket with a harness and lanyard. Second, he requested that the operator of the bucket truck move the bucket truck with Mr. Hunter in the bucket and with the boom in an elevated position. At some point, common sense must prevail. Whether adequately trained or not, Mr. Hunter should have known to secure himself to the bucket and not to allow a vehicle to be moved with the boom elevated. Thus, the Administrative Law Judge concludes that as is similar to [LMG], Mr. Hunter's intent is best inferred from his actions as well as what he learned in training. In so concluding, the Administrative Law Judge determines that there shall also be a 15% reduction in the plaintiff's award.

Hunter petitioned the ALJ to reconsider imposition of the fifteen percent safety penalty against Hunter because there was proof that LMG did not provide safety equipment, did not provide meaningful training on the use of safety equipment, and did not enforce the use of safety equipment. The ALJ denied the petition for reconsideration, characterizing it as "merely rearguing the merits of the claim."

Hunter appealed to the Board the ALJ's original opinion, the order denying the petition for reconsideration, and the order dismissing the matter from the active docket. On October 27, 2010, the Board entered an unanimous twenty-six page opinion reversing and remanding that part of the ALJ's opinion and order assessing the fifteen percent safety penalty against Hunter. The Board stated in part:

> This Board concludes the ALJ's decision to assess a 15% safety penalty against Hunter for an intentional failure to utilize a safety harness and lanyard is unsupported by substantial evidence. While there is evidence in the record regarding the specific safety statute at issue—29 CFR 1920.67(c)(2)(v) ("A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift")—and consequently there is a presumption of knowledge of this statute by [Hunter], there is *unrebutted* evidence in the record indicating LMG's failure to enforce this safety statute, specifically within its signs and marking division, therefore constituting a "general policy" of failing to require the ulilization of a safety harness and lanyard. *Barmet of Kentucky, Ind. v. Sallee,* [605 S.W.2d 29 (Ky. App. 1980)]. Pearcy's investigation revealed and concluded that while one safety harness and lanyard was available at the signs and marking office on Lexington/Payne Street, use of the harness and lanyard was not enforced and essentially left up to each individual employee. In other

words, "enforcement" of safety harness and lanyard use within LMG's signs and marking division did not go beyond optional. Additionally, every employee interviewed by Pearcy noted a lack of specific training on how to use the safety harness and lanyard. Even Mr. A. Dan Curtis, AICP, Manager, Traffic Operations, Department of Public Works, stated he knew a safety belt or harness was to be used whenever an employee was in the bucket of a bucket truck; however, no training had been given to employees on this issue. Additionally and significantly, Pearcy's investigation revealed the driver of the boom truck was responsible for picking up the safety harness and lanyard before driving to the job site. Again, this policy was not enforced. Thus, under an unenforced policy, [Hunter] was not responsible for acquiring the safety harness and lanyard from the signs and marking office before traveling to the job site on September 25, 2006. Rather the driver of the bucket truck was responsible for picking up the harness and lanyard.

This Board does not regard Montgomery's deposition testimony as rebuttal of the evidence in the record indicating LMG's general policy of failing to enforce the use of a safety harness and lanyard or providing training regarding the use of harnesses and lanyards as well as the operation of a bucket truck when the boom is elevated and someone is in the bucket. Montgomery's testimony focuses only on the bucket truck/safety harness training the Decedent allegedly received, three years before his accident, that appears, at most, to be incidental training received during chainsaw and tree trimming safety classes on September 19, 2001, and April, 2003. A review of the exhibits attached to Montgomery's deposition confirm the fact that if any bucket truck/safety harness safety training occurred during the September 19, 2001, tree trimming safety class, it was not listed as a covered topic on the certificate of attendance the Decedent signed on said date and was clearly incidental. The exhibit regarding the April, 2003, class indicates that any training regarding bucket trucks and safety harnesses was in the context of chainsaw safety. Additionally, Montgomery's testimony

regarding the bucket truck/safety harness training the Decedent allegedly received at the October 9, 2002, Safety Awareness Day was non-committal at best. . . .

Montgomery's testimony also confirmed a harness and lanyard was kept in the signs and marking office. Montgomery's testimony does not, however, rebut Pearcy's findings that there was no requirement to use the safety harness and lanyard that was provided and no enforcement of that requirement within the signs and marking division, the division wherein the Decedent worked. In other words, while the Decedent may have received incidental training on how to use a safety harness and lanyard pursuant to tree trimming and chainsaw safety classes, and the Decedent may have had knowledge of a harness and lanyard that was kept in the signs and marking office, the unrebutted evidence in the record established LMG failed to enforce or follow the specific safety statute pertaining to safety harnesses and lanyards as a "general policy." *Barmet of Kentucky, Inc. v. Sallee, supra.* Montgomery's testimony simply did not rebut this fact. In fact, the lack of any kind of *consistent* and focused training regarding bucket trucks, safety harnesses, and lanyards, specifically in the three years immediately preceding the Decedent's accident, as confirmed by Montgomery in his deposition, is supportive of this Board's conclusion concerning the general policy of not using safety harnesses and lanyards within the signs and marking division. The bottom line is there was very limited training regarding the use of a bucket truck, safety harnesses, and lanyards and any such training was in the context of chainsaw and tree trimming safety. However, this does not establish LMG provided specific and consistent safety training regarding the use of bucket trucks, safety harnesses, and lanyards and, more importantly, required the use of safety harnesses and lanyards when its signs and marking employees are working from a bucket truck as required by the safety regulations. Given all of the above, we believe this case falls squarely within the holding of *Barmet of Kentucky, Inc. v. Sallee, supra,* and establishes that LMG as a "general policy," failed to enforce or follow the safety statutes and regulations by failing to require its

employees, within the signs and markings division, to utilize a safety harness and lanyard at all times when working from a bucket truck. This is most glaringly evidenced by the fact LMG had not conducted any specific training regarding the use of harnesses and lanyards nor conducted annual training sessions regarding boom truck safety, as required by OSHA, in the three years immediately preceding the death of the Decedent. Thus, imposition of the penalty pursuant to KRS 342.165 reducing Hunter's benefits by 15% is not supported by the evidence and is an error of law.

Regarding the Decedent's alleged request that the driver move the bucket truck, it requires too great of a factual leap to reconcile the driver's movement of the bucket truck while the Decedent was in the bucket on September 25, 2006, *whether pursuant to the Decedent's request or not,* with the assessment of a safety penalty against Hunter. The safety statute allegedly implicated here is 29 CFR 1910.67(c)(2)(viii) which reads as follows:

> An aerial lift truck may not be moved when the boom is elevated in a working position with men in the basket, except for equipment which is specifically designed for this type of operation in accordance with the provisions (b)(1) and (b)(2) of this section.

We find this statute to be irrelevant to the issue of the Decedent's liability under KRS 342.165, as the Decedent cannot *intentionally violate* a safety statute that is not applicable to him as the Decedent was not the driver of the bucket truck on the day of his fatal accident. The driver of the bucket truck was ultimately responsible for moving the truck on said date. We conclude the ALJ's imposition of a 15% safety penalty pursuant to KRS 342.165, based in any way on the Decedent's alleged violation of 29 CFR 1910.67(c)(2)(viii), would lead to a result unintended by the legislature and therefore is erroneous as a matter of law and not supported by any evidence in the record.

[Emphasis in original]. With those words, the Board reversed the ALJ's assessment of a fifteen percent safety penalty against Hunter. This petition for review followed. We affirm.

LEGAL ANALYSIS

In a workers' compensation case, "the ALJ, as fact-finder, has the sole authority to judge the weight, credibility and inferences to be drawn from the record." *Miller v. East Kentucky Beverage/Pepsico, Inc*., 951 S.W.2d 329, 331 (Ky. 1997). While an ALJ's decision may be appealed to the Board, "the Board may not substitute its judgment for that of the ALJ concerning the weight of evidence on questions of fact." *Smith v. Dixie Fuel Co*., 900 S.W.2d 609, 612 (Ky. 1995); KRS 342.285(2). Our role in reviewing Board decisions "is to correct the Board only when we perceive that the Board has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Daniel v. Armco Steel Co., L.P.*, 913 S.W.2d 797, 798 (Ky. App. 1995), quoting *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687–688 (Ky. 1992)); *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

The ultimate question on appeal is whether the ALJ's decision is supported by "substantial evidence," *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984), which has been defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971). LMG contends the Board usurped the ALJ's sole authority to evaluate

the evidence and should be reversed. We disagree with this contention as the facts do not support a finding that Hunter intentionally failed to use a safety harness and lanyard while in the bucket truck or "to obey" a reasonable employer-enforced safety regulation as required by KRS 342.165(1).

LMG bore the burden of proving Hunter intentionally disregarded a known LMG safety rule. *See Whittaker v. McClure*, 891 S.W.2d 80, 82 (Ky. 1995) (discussing *Barmet*). Thus, before any penalty could be assessed against Hunter, LMG had to first prove that specific safety training had been provided to Hunter, that safety equipment had been made available to him, and that use of safety equipment was routinely enforced. Then, LMG had to prove that Hunter willfully disregarded those safety rules and regulations. It is only upon successfully establishing these items that LMG could prevail on its claim that Hunter should be assessed a fifteen percent statutory penalty.

Here, in imposing the safety penalty on Hunter, the ALJ based his decision exclusively on the deposition of Montgomery who became LMG's equipment training/safety officer in August of 2006, just one month before the accident that claimed Hunter's life. The Board correctly summarized Montgomery's testimony as establishing that any training Hunter may have received on the use of bucket trucks and harnesses and lanyards was merely incidental to training that focused on chain saws and tree trimming. All Montgomery truly said in his deposition was that he recalled seeing Hunter at training sessions that ceased three years before the accident. When pressed,

Montgomery admitted he lacked personal knowledge of whether Hunter *knew* a harness and lanyard were available at the Signs and Marking Shop; whether Hunter *knew* he was to take the harness and lanyard to the job site when using a bucket truck; or whether Hunter *knew* a bucket truck was not to be moved with a person in the bucket. Without proof Hunter knew these things, and with an abundance of unrebutted proof that he did not, coupled with proof that use of a harness and lanyard was optional for Signs and Marking employees, we hold it was error to impose a safety penalty on Hunter when KRS 342.165 requires proof of an intentional failure by the employee. *See Barmet of Kentucky, Inc.*, 605 S.W.2d at 32. "[E]ven where a safety rule exists, if the employer fails to enforce the rule, it cannot hope to penalize a worker for failing to follow the rule." *Whittaker*, 891 S.W.2d at 82. Here, the proof established the lack of meaningful training and enforcement by LMG.

For the foregoing reasons, we hold the ALJ's opinion and order is not supported by substantial evidence and affirm the opinion of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael J. O'Connell
Louisville, Kentucky

BRIEF FOR APPELLEE:

Scott M. Miller
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