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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001816-WC

READY ELECTRIC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-11-80389

THOMAS SCHARRINGHAUSEN;
HONORABLE JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, DIXON, AND STUMBO, JUDGES.

DIXON, JUDGE: Ready Electric seeks review of an opinion of the Workers'

Compensation Board affirming an ALJ's award of benefits to Thomas

Scharringhausen. The sole issue presented concerns the ALJ's determination that

Ready Electric committed an intentional safety violation that caused Scharringhausen's injury, entitling him to enhanced benefits pursuant to KRS

342.165(1). The statute states, in relevant part:

If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative 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.

Scharringhausen sustained serious injuries when his leg was caught in an industrial exhaust fan while working as a commercial electrician for Ready Electric. Scharringhausen was at a job site with his supervisor, Mike Phillips, to repair a six-foot industrial exhaust fan on the roof of a two-story building. Phillips, a journeyman electrician, placed a lock-out/tag-out device on the electrical circuit on the ground floor to disconnect the fan from electricity so it could be repaired. After replacing two of the belts inside the fan, Phillips returned to the ground level and removed the lock-out/tag-out device. Back on the roof, Scharringhausen was working on a third belt when the belt inadvertently hit the service ignition switch and turned on the fan. Scharringhausen was seriously injured when his leg was pulled into the fan mechanism. Scharringhausen sustained multiple fractures of the

proximal and distal calcaneus, complete disruption of the Achilles' tendon, and partial evulsion of the left heel.

Jeffrey Callam, the safety director of Ready Electric, investigated the accident. Callam concluded the accident was caused by “not placing Lock-out/tag-out materials on the motor's switch prior to beginning work.” Callam identified violations of the company's rules and an OSHA violation, relating to the failure to lock-out/tag-out the main electric circuit and the motor switch on the fan itself. At his subsequent deposition, Callam testified that Phillips, as the supervisor, was responsible for implementing lock-out/tag-out and that Phillips failed to lock-out the fan that day.

The ALJ determined Scharringhausen was entitled to enhanced benefits pursuant to KRS 342.165(1), reasoning, in part:

In this particular instance, an especially dangerous workplace condition occurred when the employer had the plaintiff, an apprentice[,] working on electrical fan motor which was supplied with electricity. The responsible person failed to observe lockout/tag out procedures which created the dangerous condition. Without question, this is a hazard recognized in the electrical industry as is clearly indicated in the testimony of Jeff Callam, Mike Phillips and the plaintiff. Given the fact the plaintiff was working down in an industrial sized fan and the accident in question caused serious physical harm, there is no question that working on such an instrument without observation of lockout/tag out procedures is a hazard likely to cause death or serious physical harm. To the undersigned, it is clear the

plaintiff's supervisor disregarded the safety procedure and reengaged the electrical supply while the plaintiff was continuing to work in the dangerous position. To the undersigned this is a clear case for the application of the 30% penalty provision noted above.

Ready Electric appealed to the Board, alleging the ALJ erred by enhancing Scharringhausen's benefits pursuant to KRS 342.165(1). The Board remanded the claim to the ALJ for additional findings as to whether the ALJ's decision was premised upon an intentional safety violation pursuant to KRS 342.165(1), or a violation of the "general duty" clause of KRS 338.031(1)(a).¹ On remand, the ALJ made specific findings as to Ready Electric's violation of safety regulations for lock-out/tag-out procedures. The ALJ stated, in relevant part:

I find the plaintiff's accident and injury of July 25, 2011 occurred as a result of specific lockout/ tag out regulations set forth at [29] CFR 1910.147. Additionally, the actions of Mike Phillips (the plaintiff[']s supervisor) violated specific company policy regarding lockout/tag out as outlined by the safety director, Jeff Callam. I find that after initially locking out and tagging out the power supply, Mike Phillips, intentionally removed the lockout/ tag out and prematurely reengaged the power supply to the electrical fan motor on which the plaintiff (a commercial electrician who had not yet reached apprentice status) was working. This intentional act in violation of the specific company rule and safety

¹ KRS 338.031(1)(a) provides that an employer "[s]hall 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[.]"

regulation led to the severe injuries sustained by the plaintiff.

Ready Electric appealed the ALJ's order on remand, and the Board affirmed. This petition for review followed.

Ready Electric argues here, as it did before the Board, that Phillips's failure to comply with the lockout regulations should not be imputed to Ready Electric as the "the employer" for purposes of KRS 342.165(1). Ready Electric emphasizes that it was the intentional act of Phillips, rather than an intentional act by Ready Electric that injured Scharringhausen. We disagree.

In *Chaney v. Dags Branch Coal Co.*, 244 S.W.3d 95 (Ky. 2008), the Kentucky Supreme Court addressed KRS 342.165(1) and the enhancement of benefits due to the employer's specific safety violation. The Court explained an employer's knowledge of state and federal workplace safety requirements is presumed; accordingly, the employer's "intent" is inferred when there is a failure to comply with a specific safety regulation. *Id.* at 101. The Court concluded, "[i]f the violation 'in any degree' causes a work-related accident, KRS 342.165(1) applies." *Id.*

Here, Ready Electric attempts to escape responsibility for the violation of a safety regulation committed by its employee, Phillips. The record supports the ALJ's conclusion that Phillips failed to comply with the lock-out/tag-out procedures codified in 29 CFR 1910.147, which ultimately caused

Scharringhausen’s injury. Ready Electric argues there was no proof it intentionally failed to comply with a safety regulation; however, pursuant to *Chaney*, Ready Electric’s “intent,” as the employer, was inferred from the fact that a safety violation occurred. *See id.* We have fully considered each of the arguments raised by Ready Electric, and we are not persuaded the Board erred in its decision to affirm the ALJ.

For the reasons stated herein, the decision of the Workers’ Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rodney J. Mayer
Louisville, Kentucky

BRIEF FOR APPELLEE:

Stuart E. Alexander
Louisville, Kentucky

BRIEF FOR AMICUS CURIAE,
Kentucky AFL/CIO:

Jeffery A. Roberts
Murray, Kentucky