RENDERED: DECEMBER 14, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002216-WC

INTEGRATED ELECTRICAL & DATACOM — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-04-01720

GEORGE HUSSEY; ELLIOT ELECTRIC/ KENTUCKY, INC.; HONORABLE W. BRUCE COWDEN JR., ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD[1] AND WINE, JUDGES; BUCKINGHAM,[2] SENIOR JUDGE.

HOWARD, JUDGE: Integrated Electrical & Datacom (hereinafter Integrated Electrical) petitions for review of a decision of the Workers' Compensation Board which affirmed an

[1] Judge James I. Howard completed this opinion prior to the expiration of his appointed term of office on December 6, 2007. Release of the opinion was delayed by administrative handling.

[2] Senior Judge David Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

award by the Administrative Law Judge, finding that George Hussey (hereinafter Hussey) was jointly employed by Integrated Electrical and Elliot Electric/Kentucky, Inc. (hereinafter Elliot Electric) and that Hussey's award should be enhanced by the three-multiplier pursuant to KRS 342.730(1)(c)1. Finding no error, we affirm.

George Hussey was employed by Integrated Electrical as a licensed electrician from 1997 until it was acquired by Elliot Electric on June 1, 2004. Hussey testified that in early May 2004, the owner of Integrated Electrical, Dale Marshall, informed him that Elliot Electric was buying Integrated Electrical. Hussey further testified Mr. Marshall also told him at that time that the Nicholasville, Kentucky, project on which Integrated Electrical was working was to be an "Elliot job," even though Integrated Electrical continued to pay Hussey's wages until it was formally acquired by Elliot Electric. Hussey testified that Marshall told him that after Elliot Electric acquired Integrated Electrical, "we're [Integrated Electrical] going to change the names on the truck and keep right on going, no change." An administrative assistant at Elliot Electric, Barbara McNees, testified that Integrated Electrical employees who passed a drug test were provided the opportunity to work for Elliot Electric, and that a meeting was conducted on May 26, 2004, for Hussey and other Integrated Electrical employees to complete employment and insurance forms. It was during this May 26 meeting that Hussey sustained an injury to his back and right hand when the metal folding chair in which he was sitting collapsed. Elliot Electric acquired Integrated Electrical on June 1, 2004, and Hussey worked for Elliot Electric until August 13, 2004.

The Adminstrative Law Judge, the Honorable W. Bruce Cowden, found that Hussey was employed by both Integrated Electrical and Elliot Electric when he was injured. The ALJ found that Hussey sustained a six percent permanent impairment rating and that Hussey could not return to the type of work he performed at the time of his injury, awarding Hussey the enhancement of benefits pursuant to KRS 342.730(1)(c)1. Prior to the ALJ's final decision, Elliot Electric and Hussey settled. Integrated Electrical appealed to the Workers' Compensation Board, which affirmed the ALJ decision. Integrated Electrical petitioned for review of the board's decision.

On review, our duty is to correct the Board only where it "has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Integrated Electrical first contests the finding that Hussey was injured in the course and scope of his employment with Integrated Electrical. It acknowledges that Hussey was still employed by Integrated Electrical on the date of his injury, but argues that he was in a "dual employment," rather than a "joint employment" and that he was not performing any services for the benefit of Integrated Electrical at the time of his injury. Hussey responds that "the inner workings of Integrated and Elliot were so intertwined that whatever activity he was performing that related to his job was done for the benefit of both." After a consideration of the arguments and the record, we adopt the following excerpt relating to this issue from the Board's well-reasoned decision:

The ALJ also found that Hussey was jointly employed by Integrated and Elliott (sic) at the time of his injury and cited the "joint employment" doctrine as legal authority for his conclusion.

Professor Larson offers the following definition of "joint employment":

> Joint employment occurs when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other. In such a case, both employers are liable for workmen's compensation.
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> * * * *
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> Joint employment is possible, and indeed fairly common, because there is nothing unusual about the coinciding of both control by two employers and the advancement of the interests of two employers in a single piece of work.

Larson, Larson's Workers' Compensation Law, § 68.01, Desk Ed. (1998).

Putting an even finer point on the matter, Professor Larson discusses joint business arrangements creating joint employment situations in the following excerpt from his treatise:

> The joint employment may come about simply because of the joint character of the business arrangement between the two employers. The most obvious illustration is that of a classic joint venture. For example, the owner of a ferris wheel furnished it to the operator of a carnival, while the latter furnished and paid for all help necessary for its operation, the net

> proceeds being equally shared. They were held to be joint adventurers. Joint employment may also be found when work is performed for affiliated or closely related corporations or businesses. *Again, the coincidence of interest and control may occur because one employer is the proprietor of a business that the other is involved in liquidating.*

Larson, Larson's Workers' Compensation Law, § 68.03, Desk Ed. (1998). (Emphasis added [by the Board]).

The ALJ cited ample evidence in the form of testimony from McNees, Marshall and Hussey to establish coincidence of interest and joint control on the part of Integrated and Elliott (sic) over Hussey's work on the Town Square Bank project. As much of that evidence is relevant to our consideration of Integrated's argument on the issue of course and scope of employment, it will be summarized in that context, below.

Throughout its first argument, Integrated repeats the refrain "there is absolutely no evidence" that Hussey was in the course and scope of his employment with Integrated when the accident at issue occurred. Integrated's argument relies heavily on what it characterizes as a total lack of evidence that Integrated compelled, encouraged or received any benefit from Hussey's attendance of the orientation required for him to become an Elliott (sic) employee. We disagree with this assessment of the evidence.

McNees testified that the sale of Integrated to Elliott (sic) was announced in a meeting jointly conducted by Marshall and the Vice President and General Manager of Elliott (sic), Jim Kemper. The meeting took place prior to May 26, 2004. All Integrated employees were given an opportunity to go to work for Elliott (sic), assuming they passed a drug test. In fact, Marshall went to work as an Account Executive for Elliott (sic) after the transfer of ownership.

Hussey testified that Marshall explained the sale to him by stating, "[W]e're going to change the names on the truck and keep right on going, no change." In fact, Hussey came to

> discover that he would appreciate a reduction in his hourly rate of pay, a loss of insurance coverage, a loss of accrued vacation, a loss of all benefits he had enjoyed under Integrated's ownership. He discovered this two weeks into Elliott's (sic) ownership of the company. We believe the foregoing evidence is sufficient for the ALJ to infer that Integrated encouraged Hussey and its other employees to go to work for Elliott (sic). It is undisputed that attendance at the orientation was necessary for Hussey to become Elliott (sic) employee.
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> Elliott (sic) purchased all of the assets of Integrated and took over the servicing of its accounts, as well. McNees testified that the amount of work being taken over by Elliott (sic) necessitated the hiring of all Integrated employees who elected to accept the transfer and passed the drug test. McNees testified that Elliott (sic) went outside the pool of Integrated workers in order to supplement the loss of workers who did not accept the transfer or did not pass the drug test. However, we believe it is reasonable for the ALJ to infer from the testimony of McNees, which is consistent with the deposition testimony of Marshall, that the availability of Integrated's workforce was part and parcel of the planned acquisition by Elliott (sic). By extension, the consent of Hussey and other Integrated employees to work under the new ownership, which facilitated the acquisition, produced a tangible benefit to the company.
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> In other words, we disagree with Integrated's assertion that there is no evidence whatsoever that Integrated encouraged its employees to go to work for Elliott (sic) or benefited from their doing so. Thus, the ALJ's determination is in accord with the two-pronged test of "compulsion" and "benefit to the employer" set out in Larson's Workers' Compensation Law and cited by the Kentucky Supreme Court in Spurgeon v. Blue Diamond Coal Co., 469 S.W.2d 550 (Ky. 1971).

We believe the finding that Hussey was jointly employed by both Integrated Electrical and Elliot Electric during the liquidation of Integrated Electrical is supported by substantial evidence and we therefore affirm the Board in this respect.

Integrated Electrical also contends that the ALJ erred in enhancing Hussey's award by the three multiplier, claiming that Hussey will "begin earning the same or greater wages and continue to do so for the indefinite future." Integrated Electrical cites the recent Kentucky Supreme Court opinion in *Adams v. NHC Healthcare*, 199 S.W.3d 163 (Ky. 2006), which held that when either the KRS 342.730(1)(c)1 multiplier or the KRS 342.730(1)(c)2 multiplier can be applied, the ALJ must choose the more appropriate subsection. *See also Fawbush v. Gwinn,* 103 S.W.3d 5 (Ky. 2003).

The Board squarely addressed Integrated Electrical's argument as follows:

> The primary substantive difference in the facts presented in Adams, supra, and those in the case *sub judice* is that the evidence before the ALJ below did not establish that Hussey currently has the capacity to earn wages equal to or greater than those earned at the time of injury. Integrated's argument is based on Hussey's speculation as to what he should be able to earn once he has completed his training and become certified as a house inspector. Hussey has never worked as a house inspector and, in fact, must complete the training program and inspect 50 houses before he may apply for certification. In Adams, supra, on the other hand, the ALJ found that, as of the final hearing, the claimant had the physical capacity to perform medium duty work, including that of a medical technician, a job for which the claimant was already qualified, which he had held in the past and which would pay wages equal to or greater than his AWW [average weekly wage].
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> It is also plain that the claimant's lack of credibility was a factor influencing the ALJ's decision in Adams, supra. There, the claimant had returned to his regular job after his injury earning equal or greater wages than his AWW, but voluntary (sic) resigned his position prior to the final hearing, where he argued he did not retain the physical capacity to return to any gainful employment at all. Here, at the time he filed his Form 101, Hussey had secured work as an electrical supervisor

> earning $23.00 per hour. He was involuntarily laid off from that job in January 2005 because he was unable to perform all of the physical tasks required of him. He found work in September 2005 earning just $10.00 per hour, but with the expectation of a significant increase in pay once he completes his training and becomes certified as a house inspector. Hussey testified that this job requires him to climb stairs and ladders to access attic spaces and roofs, inspect plumbing and wiring, etc.
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> Notwithstanding Hussey's optimism with respect to his ability to perform this work and earn substantially greater wages, it was within the ALJ's discretion to conclude that, as of the date the claim was submitted for decision, Hussey did not have the physical capacity to return to his former work nor the ability to access other employment at wages equal to or greater than his AWW. In other words, unlike the claimant in Adams, supra, there was substantial evidence upon which the ALJ reasonably could conclude that, were Hussey at that moment capable of earning higher wages, he would have availed himself of the opportunity. Of course, it is for the ALJ alone to assess the credibility of witnesses. Magic Coal Co. v. Fox, [19 S.W.3d 88 (Ky. 2000)].

Having reviewed the evidence, we agree with the Board that the ALJ's decision to apply the three-times multiplier of KRS 342.730(1)(c)(1) is supported by substantial evidence and is not clearly erroneous. The Board did not err in affirming the ALJ in this respect.

The decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gregory L. Little
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BRIEF FOR APPELLEE GEORGE HUSSEY:

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