IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: NOVEMBER 26, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000031-WC

INTEGRATED ELECTRICAL AND DATACOM — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2006-CA-002216-WC
WORKERS' COMPENSATION BOARD NO. 04-01720

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

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant was employed by Integrated Electrical and Datacom (Integrated) and by Elliot Electric (Elliot) when he sustained a work-related injury and also that the injury occurred within the course and scope of both employments. The claimant received a triple income benefit under KRS 342.730(1)(c)1 with liability apportioned equally to the two employers. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, Integrated asserts that the claimant was not acting within the course and scope of its employment or as its loaned servant at the time of the injury, that he was engaged in dual

rather than joint employment, and that the ALJ erred by applying KRS 342.730(1)(c)1 rather than KRS 342.730(1)(c)2. We affirm for the reasons stated herein.

The claimant worked for Integrated from 1997 until June 1, 2004, when it was sold to Elliot. Although Integrated's employees who were to continue working after the sale did not go on Elliot's payroll until June 1, 2004, Elliot directed those who had passed a drug test to attend a meeting after work on May 26, 2004. The claimant injured his back while attending the meeting and named both Integrated and Elliot as defendants to his workers' compensation claim. Among the contested issues were the existence of an employment relationship, whether the injury occurred within the course and scope of employment, and whether KRS 342.730(1)(c)1 or 2 applied to an award.

The claimant testified that he worked for Integrated as a job superintendent, which required him to install switch gears, pull wires, and install lights on commercial and industrial buildings. He earned $21.00 per hour and worked 40 hours per week. About three weeks before the injury, Integrated's owner, Dale Marshall, told him that he was selling the business to Elliot but assured him that it would continue to operate as before. Marshall directed him to begin the Town Square project in Nicholasville but indicated that it would be an Elliot job. During the following weeks, he ordered supplies for Elliot and received a fleet gas card from Elliot but continued to receive his paycheck from Integrated.

The claimant testified that on May 26, 2004, an Elliot employee came to the job site, administered a drug test, and directed the crew to report to the office for a meeting after work. He understood the meeting to be mandatory although he was not paid to attend. It lasted about one to one and one-half hours, during which time he received instructions regarding Elliot's safety rules, insurance, and other company benefits. He also received safety glasses and a hard hat. The chair on which he was sitting during the meeting collapsed, causing him to injure his back.

The claimant testified that Integrated continued to pay his wages until June 1, 2004. Elliot paid him two dollars less per hour thereafter, and he lost his insurance and vacation benefits. He last worked for Elliot on August 13, 2004, after which he found work as a job superintendent for an employer that accommodated his inability to run big wire and climb up and down a ladder. He received $23.00 per hour for a 40-hour week but was unable to perform odd jobs on weekends as he had done before the injury. He was laid off in January 2005 because he was unable to do the job and remained unemployed until September 2005, when he obtained work for $10.00 per hour, three or four days per week, as a home inspector trainee. He stated that after completing fifty inspections under a trainer's supervision and becoming licensed, he could earn from $175 to $600 per inspection. The work requires him to climb stairs and ladders to access attic spaces and roofs, to take pictures, and to inspect plumbing and wiring.

Dale Marshall testified in January 2005 that he was Integrated's chief executive officer until June 1, 2004, after which he worked for Elliot as an account executive. He stated that he was still in the process of closing out Integrated's business affairs, such as collecting receivables and preparing its final tax returns, but that Elliot acquired all of Integrated's materials and equipment as of June 1, 2004, in a bulk purchase agreement. Elliot also took over some of Integrated's projects as a whole and completed some of its ongoing projects on a time and materials basis. The project on which the claimant worked was in its early stages at that time, so Elliot took it over. Marshall confirmed that he discussed the sale with the claimant and his other 30-35 employees. He stated that he saw the claimant occasionally after June 1, 2004, in his role as the project manager and that the claimant never voiced difficulty in performing his work as project superintendent or in working his regular hours.

Barbara McNees, an administrative assistant, testified that Marshall and Jim Kemper, Elliot's vice president and general manager, conducted a joint meeting with Integrated's employees. The sale was announced at the meeting and all employees willing to take a drug test and comply with Elliot's policies were invited to apply for work with Elliot. Those who wished to make the transition were drug tested before the second meeting, which was held on May 26, 2004, at Elliot's office. It was scheduled after working hours to avoid pulling workers off their jobs to attend. To the best of her knowledge, the

claimant was offered a job before the meeting, which she characterized as a pre-employment orientation meeting. The attendees completed payroll and benefit forms so that they could be put on the payroll as of June 1, 2004. The meeting included a safety orientation at which they received some safety equipment so that they would have it when they started working on June 1. The claimant kept the same truck and cell phone as when employed by Integrated, but Elliot paid the expenses after June 1, 2004. She stated that although she completed an accident report after he fell, she later realized that he was not an Elliot employee at the time. She testified that Elliot paid him $19.00 per hour and that he worked a 40-hour week. She thought that he resigned due to a cut in pay to cover his insurance benefits. McNees produced documents that included a job cost history, a fleet card summary, and a time card. She testified that Integrated paid any expense that it incurred and that Elliot paid any expense incurred after June 1, 2004.

The claimant maintained that Integrated and Elliot were so intertwined when the injury occurred that he was a joint employee of both of them. Integrated argued that it was not liable, reasoning that the injury did not occur within the course and scope of its employment because the claimant was not "on the clock" and was attending a meeting for Elliot at the time it occurred. Elliot argued that it was not liable because the claimant did not become an Elliot employee until June 1, 2004.[1]

[1] After the hearing but before a decision was rendered, Elliot settled for a lump sum of $15,000, which represented half of a 5.5% disability, as enhanced under KRS

Applying the "loaned servant" doctrine, the ALJ found that Integrated loaned the claimant to Elliot, which would ordinarily make Elliot liable for compensation. The ALJ noted, however, that both employers may be liable for an injury to a loaned employee if both have a contract of hire, the employee works for both, and both employers have a right to control the details of the work. The ALJ noted also that two employers may be liable under the "joint employment" doctrine for an injury to an individual who is under a contract of hire with both employers, under their simultaneous control, and simultaneously performing the same service for both. The ALJ found that the claimant was employed by both Integrated and Elliot at the time of his injury and that the injury occurred within the course and scope of both employments; thus, the employers were equally liable for income and medical benefits. The ALJ found that the injury produced a 6% permanent impairment rating and that the claimant was entitled to a triple benefit under KRS 342.730(c)1 because the restrictions that Dr. Johnson imposed precluded a return to the type of work performed at the time of the injury. He was also entitled to a 0.4 multiplier because he was 59 years-old at the time of the injury.

The ALJ's decision must be affirmed if it was reasonable under the evidence.[2] The opinion sets forth a sufficient factual and legal basis for imposing joint liability. Substantial evidence supports the legal conclusions

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342.730(1)(c), as well as a waiver of past and future medical benefits and vocational rehabilitation benefits. The claimant reserved his right to proceed against Integrated.

[2] Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

that the claimant was employed simultaneously by Integrated and Elliot at the time of his injury and that the injury occurred within the course and scope of both employments, and the legal conclusions provide a proper basis for imposing equal liability for benefits.

Arthur Larson & 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. Dual employment occurs when an employee is under contract to two employers, under the separate control of each, performing largely unrelated services for each employer separately. In such a case, the employers are liable separately if the employee's activity at the time of the injury is severable but liable jointly if the activity is not severable.

Relying on City of Louisville v. Brown, 707 S.W.2d 346 (Ky. App. 1986), and Jackson v. Cowden Manufacturing Company, 578 S.W.2d 259 (Ky. App. 1978), Integrated asserts that the claimant's injury did not occur within the scope of its employment because Integrated neither required nor encouraged him to attend the meeting at which he was injured, had no control of the meeting, and derived no specific benefit from it. We disagree. In situations 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.[3] Substantial evidence of all three elements supported the decision in this case.

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.[4]

The claimant's injury occurred after Integrated's owner, Dale Marshall, agreed to sell the business to Elliot. The availability of experienced workers who were familiar with Integrated's accounts and who would need work after June 1, 2004, was of value in the sale. Elliot offered to hire all who passed the required drug test. Those who agreed reduced the need to look elsewhere for labor and would enable Elliot to continue to service the accounts without interruption. This clearly facilitated the transaction, benefiting both

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[3] Id.

[4] See Larson &.Larson, supra, §§ 26.02[3] and [5].

employers.[5] Finally, Marshall's conduct encouraged Integrated's employees to work for Elliot. He assured the claimant that the business would "keep right on going, no change" after the sale. He and Jim Kemper, Elliot's vice president and general manager, also held a joint meeting with Integrated's employees in order to inform them of the sale and of Elliot's interest in hiring them. The claimant's injury occurred during an orientation meeting for the Integrated employees who had been hired to work for Elliot on June 1, 2004. This evidence permitted a reasonable conclusion that an injury that resulted from the meeting came within the course and scope of both employments.

Integrated asserts that the ALJ erred by applying KRS 342.730(1)(c)1 rather than KRS 342.730(1)(c)2. It reasons that even if the claimant does not retain the physical capacity to return to the type of work performed at the time of the injury and does not presently earn the same or a greater wage, he is likely to begin to earn the same or a greater wage and to continue to do so for the indefinite future. Thus, enhancement under KRS 342.730(1)(c)2 is more appropriate. We disagree.

When the claim was heard, the claimant had lost a job that paid $23.00 per hour due to his inability to perform all of its physical requirements and earned $10.00 per hour, working three or four days per week as a trainee home inspector. He stated that he anticipated a significant pay raise when he completed the training and became licensed. The ALJ relied on the physical

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[5] See Larson &.Larson, supra, § 68.03.

restrictions that Dr. Johnson imposed and applied KRS 342.730(1)(c)1.

Integrated bases its argument that KRS 342.730(1)(c)2 is more appropriate on speculative evidence regarding what the claimant hopes to earn should he complete the training and become licensed rather than on evidence concerning what he actually earns presently. Speculative evidence does not show the finding that was made to be unreasonable. Likewise, Integrated's reliance on Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006), as compelling the finding that it seeks is misplaced. Adams concerned whether substantial evidence supported the ALJ's decision to apply KRS 342.730(1)(c)2. It is not authority for the type of evidence that would compel a finding under KRS 342.730(1)(c)2 rather than KRS 342.730(1)(c)1.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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