Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 3, 2023

CLAIM NO. 201701063

WADE MASSENGILL PETITIONER

VS. **APPEAL FROM HON. MONICA RICE-SMITH, ADMINISTRATIVE LAW JUDGE**

D.W. WILBURN, INC.,
DAVIS BROS. ROOFING,
UNINSURED EMPLOYERS' FUND, and
HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING IN PART AND REMANDING

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

ALVEY, Chairman. Wade Massengill ("Massengill") appeals from the August 10, 2022 Opinion, Order, and Award on Remand and the September 14, 2022 Order on Petitions for Reconsideration rendered by Hon. Monica Rice-Smith, Administrative Law Judge ("ALJ"). This Board previously remanded this claim to the ALJ to perform the appropriate analysis regarding whether there was an intentional

violation of a safety rule or regulation pursuant to the holding in Chaney v. Dag's Branch Coal Co., 244 S.W.3d 95 (Ky. 2008). That Opinion was affirmed by the Kentucky Court of Appeals in a decision that became final on April 14, 2021. In her decision on remand, the ALJ found Massengill's employer, Davis Brothers Roofing, LLC ("Davis Brothers"), intentionally violated safety rules or regulations based upon citations received from KOSHA, and therefore Massengill is entitled to an enhancement of his award by 30% as provided for in KRS 342.165(1). However, the ALJ determined D.W. Wilburn, Inc. ("D.W. Wilburn"), the up-the-ladder general contractor, is not responsible for paying the 30% enhancement of the award, pursuant to KRS 342.165(1), citing to the holding in Ernest Simpson Construction Co. v. Conn, 625 S.W.2d 850 (Ky. 1981).

On appeal, Massengill argues the ALJ erred by finding D.W. Wilburn is not responsible for the 30% enhancement of his award due to an intentional safety violation as set forth in KRS 342.165(1). We agree. The ALJ's reliance upon the holding in Ernest Simpson Construction Co. v. Conn, supra, is misplaced. D.W. Wilburn is responsible for payment of the entirety of the benefits awarded to Massengill as a matter of law, including the 30% enhancement pursuant to KRS 342.165(1) and therefore, on this issue, the ALJ's decision is reversed. We remand for the ALJ to render a decision finding D.W. Wilburn responsible for payment of the entirety of Massengill's award.

Massengill filed a Form 101 alleging he injured multiple body parts on June 15, 2015, when the boom lift he was working on tipped over. He and his co-worker fell approximately 40 feet. The fall caused fatal injuries to the co-worker and

serious injuries to Massengill. Massengill identified Davis Brothers and D.W. Wilburn as Defendants. He noted D.W. Wilburn was the general contractor who hired Davis Brothers as a sub-contractor for work at the Boone National Guard Center in Frankfort, Kentucky. Massengill indicated Davis Brothers is located in Tennessee, while Wilburn is located in Kentucky. Since we previously rendered an Opinion on October 9, 2020, the Court of Appeals rendered a decision, and the ALJ issued an Opinion, Order, and Award on Remand, we will only recite those facts pertinent to the remaining issue on appeal.

On June 15, 2015, Massengill was employed by Davis Brothers, and was working at the Frankfort jobsite. On remand, the ALJ determined Davis Brothers intentionally violated safety rules or regulations, specifically 29 CFR 1926.451(c)(2)(iv) and 29 CFR 1926.602, thereby triggering the enhancement of Massengill's award by 30% pursuant to KRS 342.165(1). The ALJ determined Davis Brothers did not have a valid Kentucky workers' compensation insurance policy in effect on the date of injury; therefore, pursuant to the up-the-ladder provisions contained in KRS 342.610(2), D.W. Wilburn is responsible for payment of any benefits awarded to Massengill. However, relying upon the holding in Ernest Simpson Construction Co. v. Conn, supra, the ALJ erroneously determined D.W. Wilburn is not responsible for the 30% enhancement of Massengill's award.

Both Massengill and the Uninsured Employers Fund ("UEF") filed Petitions for Reconsideration. The UEF was joined as a party because Davis Brothers did not have a valid Kentucky workers' compensation insurance policy in effect on the injury date.

Massengill argued, as he does on appeal, the holding in Ernest Simpson Construction Co. v. Conn, supra, is distinguishable from the facts of this claim. He argued KRS 342.610(2) and KRS 342.700(2), in concert, establish D. W. Wilburn is responsible for the payment of the entirety of the benefits Massengill was awarded, including the enhancement pursuant to KRS 342.165(1). The UEF argued the ALJ improperly assessed a 12% interest rate on past due and owing benefits. The UEF argued the Kentucky Supreme Court in Martin v. Warrior Coal, LLC, 617 S.W.3d 391 (Ky. 2021) established interest on past due and owing benefits is based upon a 6% rate. The UEF also argued the ALJ erred in her reliance upon the holding in Ernest Simpson Construction Co. v. Conn, supra. The ALJ granted the UEF's Petition for Reconsideration to the extent she determined Massengill is only entitled to 6% interest on past due and owing income benefits. However, she denied the Petitions for Reconsideration regarding whether D.W. Wilburn is responsible for the entirety of Massengill's award, including payment of the 30% enhancement pursuant to KRS 342.165(1).

On appeal, the sole argument is whether the ALJ erred in determining D.W. Wilburn is not responsible for payment of the 30% enhancement of Massengill's award of income benefits pursuant to KRS 342.165(1). As noted previously, we agree with Massengill, and hold, as a matter of law, the ALJ erred in finding D.W. Wilburn is not responsible for payment of the 30% enhancement of his award of income benefits. The holding in Ernest Simpson Construction Co. v. Conn, supra, upon which the ALJ relied, is not applicable to this claim. In that case, the old Workers' Compensation Board determined the sub-contractor, Conn's

employer, was responsible for payment of income benefits. The old Workers' Compensation Board also determined the general contractor, not the sub-contractor, committed a safety violation, and was therefore responsible for payment of the 15% enhancement of Conn's award, independently of the award for which the sub-contractor, his employer, was liable.

The claim before us involves a completely different circumstance. In this instance, the ALJ determined Davis Brothers, Massengill's employer, intentionally violated safety regulations, and she enhanced the award of income benefits by 30% pursuant to KRS 342.165(1). She did not independently find a safety violation committed by D.W. Wilburn. However, she found D.W. Wilburn is not responsible for payment of the 30% enhancement of Massengill's award assessed pursuant to KRS 342.165.

As argued by Massengill, he received an award of benefits, enhanced by 30%. Davis Brothers did not have a Kentucky workers' compensation insurance policy in effect on the date of the accident. Since Davis Brothers had no Kentucky workers' compensation insurance policy in effect on the injury date, D.W. Wilburn has up-the-ladder liability for payment of Massengill's award and is statutorily obligated to step in and pay the entirety of the award. Therefore, D.W. Wilburn is responsible for payment of all benefits awarded to Massengill, and as set forth in KRS 342.610(2) and KRS 342.700(2), including the enhancement pursuant to KRS 342.165(1).

The ALJ determined Wilburn is an up-the-ladder employer and is liable for Massengill's income and medical benefits stemming from the June 15, 2015

accident. The ALJ awarded temporary total disability benefits, permanent partial disability benefits, and medical benefits, and found the defendants are entitled to a credit for the benefits received by Massengill from a claim he filed in Tennessee. On remand, the ALJ also determined Davis Brothers intentionally violated safety regulations, and Massengill is entitled to an enhancement of his award by 30%. However, the ALJ found Wilburn, the up-the-ladder employer, is not responsible for payment of the enhanced portion of the award. We disagree.

KRS 342.165(1) provides as follows:

> 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.

The purpose of KRS 342.165 is to reduce the frequency of industrial accidents by penalizing those who intentionally failed to comply with known safety regulations. Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996). The burden is on the claimant to demonstrate an employer's intentional violation of a safety statute or regulation. Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997). The application of the safety penalty requires proof of two elements. Apex Mining v. Blankenship, supra. First, the record must contain evidence of the existence of a violation of a specific safety provision, whether state or federal. Secondly, evidence of "intent" to violate a specific safety provision must also be present. Enhanced benefits do not automatically flow from a showing of a violation

of a specific safety regulation followed by a compensable injury. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). The worker has the burden to demonstrate the employer intentionally failed to comply with a specific statute or lawful regulation. Intent to violate a regulation can be inferred from an employer's failure to comply with a specific statute or regulation because employers are presumed to know what state and federal regulations require. The Kentucky Supreme Court in Chaney v. Dag's Branch Coal Co., 244 S.W.3d at 101 (Ky. 2008), stated as follows:

> Absent unusual circumstances such as those found in *Gibbs Automatic Moulding Co. v. Bullock,* 438 S.W.2d 793 (Ky. 1969), an employer is presumed to know what specific state and federal statutes and regulations concerning workplace safety require. Thus, its intent is inferred from the failure to comply with a specific statute of regulation. If the violation "in any degree" causes a work-related accident, KRS 342.165(1) applies. *AIG/AIU Insurance Co. v. South Akers Mining Co., LLC,* 192 S.W.3d 687 (Ky.2006), explains that KRS 342.165(1) is not penal in nature, although the party that pays more or receives less may well view it as such. Instead, KRS 342.165(1) gives employers and workers a financial incentive to follow safety rules without thwarting the purposes of the Act by removing them from its coverage. It serves to compensate the party that receives more or pays less for being subjected to the effects of the opponent's "intentional failure" to comply with a safety statute or regulation.

As reflected above, the Kentucky Supreme Court held the additional 30% assessed due to the violation of a safety rule or regulation is not a penalty *per se*, but rather is an enhancement of the award of income benefits. Massengill satisfied the requirement necessary for the ALJ to assess the 30% enhancement pursuant to KRS 342.165(1). That determination has not been challenged on appeal. The

question is whether D.W. Wilburn is responsible for paying the enhanced benefits. We determine it is. KRS 342.610(2) states as follows:

> **342.610 Liability for compensation -- Contractor and subcontractor -- Limitation of liability if employee intended to kill or injure self or another -- Illegal substances -- Employer's intention to produce injury or death -- Builder's proof of coverage required for issuance of building permit -- Notice required to be posted by employers.**
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> (2) A contractor who subcontracts all or any part of a contract and his or her carrier **shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter**. Any contractor or his or her carrier who shall become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefor. A person who contracts with another: (a) To have work performed consisting of the removal, excavation, or drilling of soil, rock, or mineral, or the cutting or removal of timber from land; or (b) To have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person shall for the purposes of this section be deemed a contractor, and such other person a subcontractor. This subsection shall not apply to the owner or lessee of land principally used for agriculture.
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> [Emphasis added]

KRS 342.700 states as follows:

> **342.700 Remedies when third party is legally liable -- Liability and indemnification rights of principal contractors, intermediates, and subcontractors -- Requirement of waiver of remedies for award of contract unlawful**
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> (2) A principal contractor, intermediate, or subcontractor shall be liable for compensation to any

> employee injured while in the employ of any one (1) of his intermediate or subcontractors and engaged upon the subject matter of the contract, **to the same extent as the immediate employer.** Any principal, intermediate, or subcontractor who pays the compensation may recover the amount paid from any subordinate contractor through whom he has been rendered liable under this section. Every claim to compensation under this subsection shall in the first instance be presented to and instituted against the immediate employer, but the proceedings shall not constitute a waiver of the employee's rights to recover compensation under this chapter from the principal or intermediate contractor nor shall the claim be barred by limitations, if the claim is filed against the principal or intermediate contractor within one (1) year after a final unappealed order has been rendered by an administrative law judge determining that immediate employer has insufficient security to pay the full and maximum benefits that could be determined to be due him under this chapter. The collection of full compensation from one employer shall bar recovery by the employee against any other. But he shall not collect from all a total compensation in excess of the amount for which his immediate employer is liable. This subsection shall apply only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or which are under his control otherwise or management.
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> [Emphasis added]

In McCoy Elkhorn Coal Corp v. Sargent, 553 S.W.3d 802 (Ky. 2018), the Kentucky Supreme Court held the Kentucky Coal Employers Self-Insurance Fund was liable for payment of Sargent's award, including the 30% enhancement pursuant to KRS 342.165(1). Citing to the previous holding in AIG/AIU Insurance Company v. South Akers Mining Co., LLC, 192 S.W.3d 687 (Ky. 2006), the Court noted it rejected a somewhat similar argument by an employer's workers' compensation insurer based on limiting language in the parties' insurance contract

that specifically excluded its liability for any excess benefits attributable to the employer's serious misconduct or failure to comply with safety laws and regulations. Despite this limiting language, the Court unanimously held the insurer was responsible for the payment of the enhanced benefits owed to the widow and surviving child of a deceased miner pursuant to KRS 342.165(1). The Court additionally noted as follows:

> The Court acknowledged that the enhanced benefit was often referred to as a safety penalty but observed that nothing in the statute designated it as such. *Id.* at 689. The legislature did not refer to it as a penalty nor did it include the provision in KRS 342.990, the part of the workers' compensation statute specifically designated as "Penalties." *Id.* Accordingly, the insurance carrier was responsible for the employer's entire liability, including the heightened liability arising under KRS 342.165(1).

The Court determined that not only was the Guaranty Fund liable for the enhanced benefits pursuant to KRS 342.165(1), but it was also responsible for the payment of any interest on past due and owing benefits. The Court stated as follows:

> Just as the Uninsured Employers' Fund steps in where the employer is uninsured, the Guaranty Fund (like its two statutory counterparts consisting of other non-coal employers) steps in where the self-insured employer is insolvent to provide workers' compensation beneficiaries the same full benefits they were entitled to from the employer. Interest on past-due benefits is part of that full benefit and thus part of the Guaranty Fund's statutory obligation.

This holding was reiterated by the Kentucky Court of Appeals in an unpublished decision issued in 2019. James River Coal Co. v. Whitaker, 2019 WLJ 328676 (Ky. App. 2019). The Court of Appeals determined as follows:

> The Guaranty Fund … steps in where the self-insured employer is insolvent to provide workers' compensation

> beneficiaries the same full benefits they were entitled to from the employer. Interest on past-due benefits is part of that full benefit and thus part of the Guaranty Fund's statutory obligation.
> Id.

Although those cases involve the Guaranty Fund, not an up-the-ladder employer as contemplated by KRS 342.610(2), we find the same principle applies. Massengill is entitled to payment of the entirety of his award, including the enhancement pursuant to KRS 342.165(1). To find otherwise would produce an absurd result. In this instance, D.W. Wilburn bears responsibility for payment of the entire award, including the 30% enhancement, and any interest on past due and owing benefits. The ALJ's reliance upon the holding Ernest Simpson Construction Co. v. Conn, supra, as noted above, is misplaced since that case involved a separate assessment of the safety enhancement against the general contractor, not the sub-contractor/employer. As a matter of law, the ALJ erred in finding D.W. Wilburn is not responsible for payment of the entirety of Massengill's award. We direct the ALJ to enter a decision in accordance with this holding.

Accordingly, the August 10, 2022 Opinion, Order and Award on Remand and the September 14, 2022 Order on the Petitions for Reconsideration rendered by Hon. Monica Rice-Smith, Administrative Law Judge, are **REVERSED IN PART**. This claim is **REMANDED** to the ALJ for entry of a decision finding D.W. Wilburn responsible for payment of the entirety of Massengill's award of benefits, including the 30% enhancement pursuant to KRS 342.165(1).

ALL CONCUR.

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