

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000038-WC

EARTHGRAINS BAKING COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-02271

KENNETH SUMNER; HON. DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: GARDNER, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal by Earthgrains Baking Company (Earthgrains) from an opinion of the Workers' Compensation Board (the Board) which, among other things, affirmed an award of rehabilitation benefits to the appellee, Kenneth Sumner (Sumner). Earthgrains contends that Sumner is not entitled to an award of rehabilitation benefits because he was fired for insubordination, and the termination of his employment was unrelated to his injury. We affirm.

On November 9, 1995, Sumner, while in the course and scope of his employment as a baker's helper with Earthgrains,

caught his foot in a conveyor belt causing him to trip and fall. The fall resulted in fractures to his right wrist and elbow. Sumner's arm was placed in a sling, and he underwent physical therapy for several months. Sumner returned to light-duty work a few days after the injury but was limited to fewer work hours. On January 16, 1991, Sumner was released to regular duty with the restriction of repetitive motion in the use of his right arm. On August 26, 1996, Sumner underwent surgery on his right elbow.

Sumner, whom the Administrative Law Judge (ALJ) found to be credible, testified that prior to his injury he had worked from 35 to 40 hours per week plus overtime. Sumner further testified that following the injury, although he returned to his usual job, he worked only 24 to 30 hours per week. Sumner additionally testified that following the surgery on his right elbow he did not return to performing his former job; instead he was assigned tasks such as telephone duties and paperwork. Earthgrains contends that, following his surgery, Sumner returned to the same job and performed the same duties.

On October 21, 1997, Sumner filed an Application for Resolution of Injury Claim against Earthgrains. On October 23, 1997, Sumner was fired for insubordination. Following a hearing before the ALJ on August 19, 1998, the ALJ issued an opinion and award in which Sumner received an award for 15% permanent partial disability benefits and a rehabilitation evaluation in accordance with KRS 342.710. The award was affirmed on appeal to the Workers' Compensation Board. This appeal followed.

Earthgrains argues that since Sumner was forced to leave his employment because of inappropriate conduct and not by virtue of his injury he is precluded from receiving vocational rehabilitation benefits under KRS 342.710.

The function of further review of the Board in the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause a gross injustice. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

The statutory authority for the awarding of vocational rehabilitation benefits is set forth in KRS 342.710(3), which provides, in pertinent part, as follows:

When as a result of the injury [an employee] is unable to perform work for which he has previous training or experience, he shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him to suitable employment. . . . The arbitrator or administrative law judge on his own motion, or upon application of any party or carrier, after affording the parties an opportunity to be heard, may refer the employee to a qualified physician or facility for evaluation of the practicability of, need for, and kind of service, treatment, or training necessary and appropriate to render him fit for a remunerative occupation.

The term "suitable employment" in KRS 342.710(3) means "work which bears a reasonable relationship to an individual's experience and background, taking into consideration the type of work the person was doing at the time of injury, his age and education, his income level and earning capacity, his vocational aptitude, his mental and physical abilities and other relevant

factors both at the time of injury and after reaching his post-injury maximum level of improvement." Wilson v. SKW Alloys, Inc., Ky. App., 893 S.W.2d 800, 802 (1995). At the time of his injury, Sumner was earning \$12.50 per hour and was working 35 to 40 hours per week as a baker's helper. Following the accident and surgery, Sumner's work hours declined to 24 to 30 hours per week, and his duties were reduced to answering the telephone and paperwork. Following his termination, at the time of the hearing, Sumner was working as a farm hand earning \$4.50 per hour. We cannot say that the ALJ or the Board committed flagrant error in concluding that Sumner was not engaged in suitable employment following his accident or injury.

In determining that Sumner was entitled to a vocational evaluation at the employer's expense, the ALJ found as follows:

Although not specifically raised as an issue, the Plaintiff has sought vocational rehabilitation pursuant to KRS 342.710. In reviewing the record, the Court finds that the Plaintiff has a GED education with no specialized or vocational training. His injury has rendered him unable to perform some of the work which he has previously done in the past. Accordingly, the Plaintiff shall be referred to the Department of Vocational Rehabilitation for a vocational evaluation in accordance with the provisions of the aforementioned statute. The vocational evaluation shall be at the expense of the Defendant-Employer and a determination as to the propriety of recommended training for the Plaintiff shall be in accordance with the provisions of KRS 342.710. (Emphasis added.)

When the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding,

meaning evidence which would permit a fact-finder to reasonably find as it did. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). The finding that Sumner is unable to perform "some of the work which he has previously done in the past," we conclude, meets the statutory requirements of KRS 342.710(3) and is supported by substantial evidence in the record.

The ALJ is authorized by KRS 342.710(3) to order a rehabilitation evaluation to determine if there is a need for rehabilitative services. One of the primary purposes of the Workers' Compensation Act is to help restore an injured employee to gainful employment. KRS 342.710(1). KRS 342.710(3) provides that the gainful employment to which the injured employee that is eligible for rehabilitation is to be restored must be suitable employment. Wilson, 893 S.W.2d at 800. In determining a claimant's right to vocational rehabilitation benefits, we must adhere to the general rule that the workers' compensation statutes will be liberally construed to effect their humane and beneficent purposes. Oaks v. Beth-Elkhorn Corporation, Ky., 438 S.W.2d 482, 484 (1969).

In view of Sumner's prior earning history, prior work history, prior training, the reduction in hours upon his return to work following his injury, the testimony that following his return to work his duties were limited to answering the telephone and paperwork, the ascertainment of a 15% permanent partial disability and the various physical restrictions caused by the work injury, we cannot say that the Board misconstrued KRS 342.710(3) or committed an error in assessing the evidence so

flagrant as to cause a gross injustice. Western Baptist Hospital v. Kelly, 827 S.W.2d at 685. The decision of the Board is affirmed.

ALL CONCUR.

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