

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: November 18, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0972-WC

DATE 12-9-04 ELLA GROWATT, P.C.
APPELLANT

AMERICAN COLD STORAGE

V. APPEAL FROM COURT OF APPEALS
2003-CA-0968-WC
WORKERS' COMPENSATION BOARD NO. 00-54742

SAMUEL SINEGRA; HON. JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Although the employer alleged that it had terminated the claimant for theft, the Administrative Law Judge (ALJ) relied upon the plain language of KRS 342.730(1)(c)2 and awarded an enhanced income benefit for permanent partial disability. The employer appealed on public policy grounds, but the Workers' Compensation Board (Board) affirmed based upon the "plain and unambiguous" language of the statute. The Court of Appeals determined that the evidence of theft was inadequate, refused to consider the public policy argument, and affirmed. Having concluded that there was insufficient evidence the claimant committed an illegal act we affirm. Therefore it is unnecessary to address the policy argument.

The claimant worked as a forklift operator for a meat storage business. On January 22, 2001, he tripped and fell at work, injuring his back. After surgery to relieve the effects of the injury, he returned to work. He continued working until sometime in

January, 2002, when he was fired upon allegations that he had stolen some meat.

Unable to find other work, he filed an application for workers' compensation benefits.

The employer asserted that the reason for the claimant's termination was that he accepted meat from drivers who made deliveries to the company, thereby committing theft. There was no evidence that there was an investigation, no evidence that any charges were filed, and no evidence that the claimant was asked to make restitution.

The sole evidence concerning the matter was the claimant's testimony. When deposed, he responded to questions posed by counsel for the employer as follows:

Q. Why did they fire you, if you know?

A. They said that they thought that I was stealing.

Q. What did they think you had stolen?

A. Food.

Q. Is there any litigation or criminal charges or anything at this time?

A. No.

Q. What kind of food did they have there that they thought you were stealing?

A. I don't know. They said ribs and several –

Q. Steaks, things like that?

A. Right.

Q. Were you?

A. No.

Q. How did they claim that they caught you doing that? Did they have surveillance cameras or –

A. No. They asked me.

Q. They came up and said, "Are you stealing?" –

A. Right, and I told them that I have took stuff out of the trucks that truck drivers gave me and they said that was stealing.

Q. So then you were taking some items? There was a question as to who was able to give you those items?

A. Right, and they said that was more or less their stuff and that I was stealing it.

Q. How long had you been accepting those gifts from the truck drivers?

A. Oh, I have no idea.

After reviewing the lay and medical evidence, the ALJ determined that the claimant's impairment was 16% and that he retained the physical capacity to return to

the type of work he performed when injured. Noting that he returned to work after the injury but was terminated for reasons that were unrelated to the claim, the ALJ applied KRS 342.730(1)(c)2 and enhanced his income benefit. The employer's petition for reconsideration argued that the legislature did not intend for KRS 342.730(1)(c)2 to permit enhanced benefits to an individual who was terminated for engaging in criminal behavior, but the ALJ denied it on the ground that the language of the statute was clear and unambiguous.

The Board affirmed, relying on the "plain and unambiguous" language of the statute. The Court of Appeals affirmed, noting that the alleged theft was inadequately substantiated and, therefore, that it was unnecessary to reach the employer's public policy argument. This appeal followed.

KRS 342.730(1)(c)2 provides as follows:

2. If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments. (emphasis added).

The employer asserts that it is the longstanding policy of the Commonwealth to prevent individuals from benefiting from their illegal acts. Its argument is that although KRS 342.730(1)(c)2 enhances an award upon the cessation of employment "with or without cause," the phrase refers only to the generally accepted requirements for permissible termination of an employee and not to a termination for committing an illegal act. Therefore, what matters under the statute is not whether the claimant was fired

“with or without cause” but whether he was fired for committing an illegal act. Relying on various statutes and cases that illustrate a policy of reducing or disallowing compensation to wrongdoers or of refusing to enforce contracts that are illegal or where the consideration is against public policy, the employer concludes that to interpret the statute in a manner that encourages illegal conduct would be contrary to public policy.

KRS 342.730(1)(c)2 is clear and unequivocal. It provides for the enhancement of an award during a cessation of employment “for any reason, with or without cause.” The employer’s public policy argument rests on its allegation that the claimant was not working because he committed an illegal act and was fired for doing so. Yet, the ALJ made no finding that the claimant actually committed theft, and the employer requested none. Furthermore, the evidence of record was insufficient to support such a finding had it been made. Absent substantial evidence that the claimant actually committed an illegal act, the employer failed to show that the premise supporting its public policy argument existed. Therefore, it is unnecessary to consider the argument.

The decision of the Court of Appeals is affirmed.

All concur.

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