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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: AUGUST 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 12-18-08 Ella Grant D.C.

2007-SC-000810-WC

JERRY GIBSON — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
2007-CA-000789-WC
WORKERS' COMPENSATION BOARD NO. 05-91008

WEHR CONSTRUCTORS, INC.,
HON. DONNA H. TERRY, ADMINISTRATIVE
LAW JUDGE AND WORKERS' COMPENSATION
BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING

An Administrative Law Judge (ALJ) determined that the claimant's employer failed to provide a safe workplace as required by KRS 338.031(1)(a) insofar as it required him to work at a height of 15 feet on an unsupported, unsecured extension ladder that could be expected to move and cause a serious physical injury. On that basis, the ALJ ordered an additional 30% compensation under KRS 342.165(1). Although the Workers' Compensation Board affirmed, the Court of Appeals reversed because it found no evidence to support a finding that the employer egregiously violated KRS 338.031(1)(a). We reverse and reinstate the award.

The claimant worked for the defendant-employer from August 2002 through January 2003 and again from June 2003 through May 21, 2004, as a laborer on a

hospital renovation and building project. On May 21, 2004, his supervisor directed him and one of the carpenters to use spray foam to patch holes on the outside of the building. The carpenter, who was his superior, left to do other work. The claimant testified that the job required him to place a 40-foot metal extension ladder amidst piles of gravel and concrete pipes. He could not find a rope to secure the ladder and asked his supervisor for a safety harness, but none was available at the time. The claimant testified that he grasped a series of masonry clips with his left hand in an attempt to steady the ladder as he reached up to spray foam into the cracks around a beam. When a clip that he was grasping broke, he fell backwards from a height of about 15 to 20 feet. He stated that he was able to kick the ladder away and land on compacted gravel, near a generator or other large machine, rather than on a series of three-foot concrete pipes. He experienced immediate low back pain, and was taken to the emergency room. In February 2005 he underwent a fusion from T10-L2 and kyphoplasty at T12 as a consequence of the injury. When asked if he had ever received training regarding how to use the ladder safely, he stated that he had not.

The project superintendent did not observe the fall but arrived at the scene immediately after it occurred. He estimated that the claimant used a 16- to 20-foot ladder and fell from a height of 8 to 10 feet. He was unsure of the applicable safety regulations but did not think that they required the ladder to be tied off (i.e., secured to a stationary object). He confirmed that no safety harness was available at the time of the accident but did not know where one could have been attached to the building in any event. He also did not know if the injury could have been prevented if someone had been assigned to hold and support the ladder.

Among the contested issues was whether benefits should be increased by 30% under KRS 342.165(1) due to an alleged safety violation by the employer. The claimant alleged that the employer failed to provide a safe workplace as required by KRS 338.031(1)(a) and failed to comply with 29 CFR 1926.1053(b).

The ALJ determined that the injury left the claimant partially disabled, with a 31% permanent impairment rating and an inability to perform the type of work that he performed at the time of injury. Noting that 29 CFR 1926.1053(b)(1) pertains to portable ladders used for access to an upper landing surface, the ALJ found it to be inapplicable. The ALJ did determine that the employer failed to provide a safe workplace because an unsupported and unsecured ladder holding an individual at a height of 15 feet could be expected to move and result in an injury such as the claimant sustained. Yet, the employer took no measure to help assure that he would not lose his balance and provided no permanent device that he could grasp to help hold the ladder against the building. The ALJ viewed the superintendent's uncertainty concerning whether the regulations required the ladder to be tied off and whether the injury could have been prevented if someone had held the ladder in place as being evidence of an intentional failure to secure a safe work environment.

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. If an accident is caused in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer or to obey any lawful and reasonable order or

administrative regulation of the executive director or the employer for the safety of employees or the public, the compensation for which the employer would otherwise have been liable under this chapter, shall be decreased fifteen percent (15%) in the amount of each payment.

KRS 338.031(1) is known as KOSHA's "general duty" provision. It requires every employer to comply with all safety and health standards promulgated under Chapter 338 and to provide a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." The court acknowledged in Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996), that KRS 342.165(1) refers to an intentional violation of a "specific" safety statute or regulation and that, as used in KRS 338.031(1), the term "recognized hazards" could be construed broadly to include hazards that safety experts might recognize but that workers and employers might not.[1] It determined, however, that an employer's intentional disregard of an obvious safety hazard that is likely to cause death or serious harm complies with KRS 342.165(1) and justifies increasing the worker's benefits.

In Apex Mining v. Blankenship, supra, the ALJ found that the employer violated KRS 342.165(1) by knowingly providing Blankenship with a grader without brakes, with a decelerator not in proper condition, and with a throttle fastened in the wide open position. Evidence indicated that other workers had been forced to crash the machine into other equipment in order to stop it. The court noted that the employer could not reasonably have been unaware of the safety hazard that the machine created and upheld the decision. Likewise, in Brusman v. Newport Steel Corporation, 17 S.W.3d 514 (Ky. 2000), the court upheld a decision to apply KRS 342.165(1) based on a

1 See Barmet of Kentucky, Inc. v. Sallee, 605 S.W.2d 29 (Ky. App. 1980).

general duty violation. Ms. Brusman, a railroad switchperson, was injured while riding on the personnel ladder attached to the side of a rail car, approaching a pinchpoint between the main line and a spur. She was crushed between the car that she was riding and a car that was parked on the spur, near the pinchpoint, with sides that were bowed out about two feet. The ALJ determined that railway cars with bowed sides created an obvious hazard, that the employer had knowledge of the cars, and that workers routinely rode on the side of railroad cars without punishment.[2]

Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997), concerned a teacher at a vocational school who suffered physical and psychiatric injuries from an exposure to chemicals. Cummins worked in a shop the size of a three- or four-car garage and often kept a garage-type door and two other doors open. He testified that the shop was unsafe because it did not have a ventilation system or monitors, and his wife testified that he had informed his principal and others. His expert testified that proper ventilation and the use of protective gloves and a respirator are in order when working with solvents, but he did not measure the level of solvents in the air at the shop or indicate what type of ventilation was proper for that particular environment. The ALJ determined that Cummins failed to meet his burden of proof under KRS 342.165(1). The court determined that the evidence did not compel a favorable decision, noting that Cummins pointed to no violation of a statute or regulation concerning the safe use of solvents and failed to show an intentional disregard of patently obvious safety concepts on the employer's part.

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2 See also Hawkeye Construction Co. v. Little ex rel. Little, 151 S.W.3d 360 (Ky. App. 2004).

In the present case, the ALJ found for the claimant. Thus, the question on appeal is whether substantial evidence supported the finding, in other words, whether the finding was reasonable.[3] We conclude that it was.

29 CFR 1926.1053(b) contains a number of requirements for the safe use of ladders, among which are the angle at which a non-self-supporting ladder must be placed and other requirements concerning ladder placement.[4] Nothing refuted the claimant's testimony that he received no training in ladder safety or his testimony concerning the machinery, piles of gravel, and concrete pipes that were present in the area in which the ladder was placed. It is obvious that an unsupported and unsecured extension ladder, placed in such an area by an untrained individual and holding an individual who is working at a height of 15 feet, could be expected to move and result in a serious injury. The employer directed the claimant to perform the work but did nothing to help assure that he would not lose his balance, such as training him in ladder safety or assigning someone to hold and support the ladder. Although the evidence would not have compelled a finding for the claimant, it was adequate to support the finding that was made.

The decision of the Court of Appeals is reversed, and the award under KRS 342.165(1) is hereby reinstated.

Minton, C. J., and Abramson, Cunningham, and Noble, JJ., concur. Schroder and Scott, JJ., dissent without opinion. Venters, J., not sitting.

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3 Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1999).

4 See also 29 CFR § 1910.26(c)(3), which concerns portable metal ladders.

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