

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000789-WC

WEHR CONSTRUCTORS, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-91008

JERRY GIBSON; HON. DONNA H. TERRY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION REVERSING AND REMANDING

** ** * * * **

BEFORE: DIXON AND VANMETER, JUDGES; GRAVES,¹ SENIOR JUDGE.

VANMETER, JUDGE: Wehr Constructors, Inc. petitions for the review of the Workers' Compensation Board's opinion affirming an Administrative Law Judge's (ALJ's) opinion and award ordering Wehr to pay Jerry Gibson certain temporary total and permanent partial disability benefits. Wehr argues that because it did not intentionally violate a

¹ Senior Judge John William Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

specific safety statute, the ALJ erred by increasing Gibson's benefits. For the following reasons, we reverse and remand.

In her opinion and award, the ALJ summarized the evidence in the matter in part as follows:

[Mr. Gibson] was employed by Wehr Constructors on two occasions, from August 2, 2002 through January 2003 and then re-employed on June 10, 2003 as a laborer in a hospital renovation and building project in Somerset.

On May 21, 2004, Mr. Gibson was directed to climb a metal extension ladder to patch holes on the outside of the hospital building. While filling the holes with spray foam, he held onto the side of the building with his left hand, grasping a metal clip which stuck out from a concrete block. The clip broke, causing Mr. Gibson and the ladder to fall backwards, resulting in a fall of 15 to 20 feet (based upon Mr. Gibson's estimate) or 8 to 10 feet (based upon his supervisor's estimate).

Mr. Gibson experienced immediate low back pain following the fall and was transported to the hospital's emergency room, where he received conservative treatment.

Gibson subsequently underwent "a posterior lateral fusion at T-10 – L2 with pedicle screws and rods and kyphoplasty at T-12 on February 2, 2005."

The ALJ found that Wehr did not provide Gibson with a safe place to work since

the unsupported and untied ladder on which he was balanced some 15 feet above ground level could be expected to move and to cause an injury similar to that sustained on May 21, 2004. There was no assistive device or other securing measure to prevent Mr. Gibson from losing his balance and no permanent device to which he could hold to help secure the ladder against the building.

. . . .

. . . Mr. Gibson was not provided with a safe place to work as required by KRS 338.031(1)(a) and Wehr Constructors can be charged with intentional failure to secure that safe work environment. Mr. Whitaker² testified that he was not sure of applicable safety regulations but did not think that a tie off would be required in this situation. He also was not certain whether the injury could have been prevented if someone had been assigned to hold and support the ladder. Based upon the foregoing, Mr. Gibson is entitled to enhanced benefits under KRS 342.165(1)[.]

(Footnote added.) The ALJ calculated Gibson's benefits accordingly, and the Board affirmed. This petition for review followed.

Wehr argues that the ALJ erred by finding that Wehr committed an intentional safety violation, and that the Board erred by affirming the ALJ's decision in that regard. We agree.

A workers' compensation claimant must prove every element of his claim. *Jefferson County Public Schools/Jefferson County Bd. of Educ. v. Stephens*, 208 S.W.3d 862, 866 (Ky. 2006). This includes proof that "the employer's intentional violation of a specific safety statute or regulation contributed to his injury." *Cabinet for Workforce Development v. Cummins*, 950 S.W.2d 834, 837 (Ky. 1997). Here, since Gibson was found to have met his burden below, the question on appeal is whether the decision was supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984).

² Earnest Dale Whitaker testified that he was a supervisor at Wehr who acted as superintendent on the project on which Gibson was injured.

KRS 342.165(1) penalizes an “employer’s intentional violation of a specific statute or regulation which relates to the installation or maintenance of safety appliances or methods.” *Apex Mining v. Blankenship*, 918 S.W.2d 225, 228 (Ky. 1996). Such a statutory violation was found to exist in *Blankenship*, where the employer provided its employee with “a defective grader, the throttle of which was tied wide open with an ‘O’ ring.” *Id.* at 227. The grader also had “defective brakes, the decelerator pedal was not in proper condition, and the equipment could only be stopped by lowering the grader blade.” *Id.* Additionally, there was evidence that “other operators had been forced to crash the defective machine into other equipment in order to stop it” and that the employer was aware that the grader was defective. *Id.* at 229.

As to whether the employer intentionally violated a specific safety statute, the court in *Blankenship* held that no specific statute or regulation expressly required an employer to keep its grader’s brakes and decelerator in good operating condition, or to refrain from fastening the throttle in the full open position. *Id.* at 228. Nevertheless, the employer was properly penalized as it intentionally violated KRS 338.031(1)(a), which provides that each employer:

Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]

The Kentucky Supreme Court has noted that KRS 338.031(1)(a) is the “general duty” provision of the Kentucky Occupational Safety and Health Act (KOSHA). *Brusman v. Newport Steel Corp.*, 17 S.W.3d 514, 519 (Ky. 2000).

In a subsequent case, the Kentucky Supreme Court clarified its *Blankenship* holding by explaining that not every violation of KOSHA's general duty provision constitutes "the violation of a specific safety statute for the purposes of KRS 342.165." *Cummins*, 950 S.W.2d at 836. Rather, the *Blankenship* decision "clearly was based on the egregious nature of [that] particular violation" of KOSHA's general duty provision. *Id.* By contrast, the employer's failure to provide proper ventilation in *Cummins* did not indicate "such a gross disregard of patently obvious, basic safety concepts as occurred in *Blankenship*." *Id.* at 837. As such, the court held that there was not "an adequate basis to overcome the requirement of KRS 342.165 that a specific safety statute or regulation must have been violated." *Id.*

Here, even if we assume without deciding that Wehr's conduct intentionally violated KOSHA's general duty provision, it was certainly not an egregious violation. After Gibson was asked to spray foam from a ladder which extended to a point lower than the roof of the building, he fell either 15 to 20 feet or 8 to 10 feet to the ground. Even if no co-worker supported the bottom of the ladder Gibson climbed, or the two available harnesses were being used by other employees, or Gibson "couldn't find a rope" to tie off his ladder, there is simply no evidence to support a finding that Wehr egregiously violated KRS 338.031(1)(a). Accordingly, the Board erred by affirming the ALJ's decision.³

³ We note that the ALJ rejected Gibson's argument below that Wehr intentionally violated 29 C.F.R. 1926.1053(b), as that ladder regulation "applies only to portable ladders used for access to an upper landing surface." The ladder Gibson used here did not access an upper landing surface.

The Workers' Compensation Board's opinion affirming the ALJ's opinion and award is reversed. This matter is remanded for entry of an award which does not increase the level of Gibson's benefits pursuant to KRS 342.165(1).

ALL CONCUR.

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