

**Commonwealth of Kentucky  
Workers' Compensation Board**

**OPINION ENTERED: November 25, 2013**

CLAIM NO. 200995230

LANCASTER COLONY

PETITIONER

VS.

**APPEAL FROM HON. GRANT S. ROARK,  
ADMINISTRATIVE LAW JUDGE**

STEPHANIE DUNAGAN; and  
and HON. GRANT S. ROARK,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

AND

STEPHANIE DUNAGAN,  
NORMAN E. HARNED and  
HARNED BACHERT & MCGEHEE, PSC

PETITIONERS

VS.

LANCASTER COLONY CORPORATION  
TODD WILLIAMS, M.D.  
and HON. GRANT S. ROARK,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

\* \* \* \* \*

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

**RECHTER, Member.** Stephanie Dunagan ("Dunagan") injured her low back while working at Lancaster Colony on September 5, 2008. She filed a claim for workers' compensation benefits, which was ultimately resolved through a settlement agreement. The agreement reserved Dunagan's right to payment of past medical benefits, future benefits, vocational rehabilitation, as well as her right to reopen.

In July 2012, Dunagan moved to reopen the claim, which is the subject of this appeal. At a hearing held in December, 2012, Lancaster Colony agreed to pay Dunagan's medical expenses, which it had previously contested. Vocational rehabilitation was left as the primary contested issue. By the date of the hearing, Dunagan had been terminated from her employment with Lancaster Colony. After her termination, she completed a fifteen-month training program at PJs Cosmetology School. She did not have pre-approval to enroll in the program from Lancaster Colony's insurance carrier, though its records indicate it was aware she attended the program. At the hearing, she sought reimbursement for the expenses associated with the program.

In a February 19, 2013 Opinion and Award, Hon. Grant S. Roark, Administrative Law Judge ("ALJ") ordered Lancaster Colony to reimburse Dunagan for costs and expenses associated with the training program. The ALJ declined to award reimbursement for her travel to and from the school, and rejected her request for sanctions against Lancaster Colony. Each party filed a petition for reconsideration, which was summarily denied.

Both parties appealed. Lancaster Colony argues the ALJ lacked authority to order reimbursement for Dunagan's training program, because it was completed prior to the entry of any award of vocational rehabilitation. Dunagan argues the ALJ erred in declining to impose sanctions and in failing to order reimbursement for travel expenses. We affirm.

The first issue on appeal, raised by Lancaster Colony, is whether the ALJ has authority to order reimbursement for vocational rehabilitation, which had not been awarded at the time the expenses were incurred. KRS 342.710(3) is the relevant statute:

When as a result of the injury he is unable to perform work for which he has previous training and 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. In all such instances, the administrative law judge shall inquire whether such services have been voluntarily offered and accepted. The 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. Upon receipt of such report, the administrative law judge may order that the services and treatment recommended in the report, or such other rehabilitation treatment or service likely to return the employee to suitable, gainful employment, be provided at the expense of the employer or his insurance carrier. Vocational rehabilitation training, treatment, or service shall not extend for a period of more than fifty-two (52) weeks...

KRS 342.710(3) neither authorizes nor prohibits an ALJ from ordering reimbursement for vocational rehabilitation completed without prior award of the benefit. Lancaster Colony argues the ALJ is creating a new right, not authorized by statute, to allow a claimant to essentially bypass the evaluation and recommendation process. It emphasizes Dunagan was specifically told by Lancaster Colony's insurance carrier she would need to obtain an award before she would be reimbursed.

Certainly the statute does not contemplate Dunagan's approach. But we do not agree the ALJ has created a new right. As unequivocally stated in the first sentence of KRS 342.710(3), the right to vocational rehabilitation exists "when as a result of the injury [the employee] is unable to perform work for which he has previous training or experience." The services awarded must be "reasonably necessary to restore him to suitable employment."

By the clear wording of the statute, the right to vocational rehabilitation exists "when as a result of the injury he is unable to perform work for which he has previous training and experience." The right does not come to fruition because the evaluation and recommendation process was completed, nor is that process a test to determine who qualifies. Rather, it is simply a method to determine what services are reasonably necessary.

Even for that purpose, we note the permissive language concerning the evaluation and recommendation process: the ALJ "may" refer the claimant to evaluation, and "may" order services upon receipt of the evaluation report. In fact, KRS 342.710(6) specifically authorizes the ALJ to order reimbursement for vocational rehabilitation services received from other state agencies

prior to an award or evaluation. When considered in this context, we cannot interpret Dunagan's failure to first obtain an award of benefits as an effective waiver of her right to vocational rehabilitation benefits.

Furthermore, we discern no prejudice to Lancaster Colony resulting from the fact the award was granted retroactively, as the employer enjoyed a full opportunity to be heard on the issue. Ultimately, the ALJ determined the permanent restrictions placed on Dunagan by her treating physician prevent her from performing the work for which she has previous training and experience. Though Lancaster Colony has not challenged the proof supporting this conclusion, we note it is supported by substantial evidence. The ALJ next determined Dunagan is suited for employment in cosmetology, for which a training program such as PJs Cosmetology is necessary. Again, this factual finding has not been challenged, and sufficient proof supports it. Therefore, the ALJ made the required finding of entitlement. For this reason, we conclude the ALJ did not err in ordering Lancaster Colony to reimburse Dunagan for the costs and expenses of her training, "including tuition, books, supplies, kit and uniform material."

However, the ALJ specifically excluded any reimbursement for Dunagan's travel expenses to and from PJs

Cosmetology. Dunagan appeals this determination. KRS

342.710(4) provides:

Where rehabilitation requires residence at or near the facility or institution, away from the employee's customary residence, reasonable cost of his board, lodging, or travel shall be paid for by the employer or his insurance carrier.

It was established Dunagan traveled fifteen miles each way, five days per week, to attend the cosmetology program at PJs. The ALJ concluded this distance did not constitute rehabilitation "away from" Dunagan's customary residence.

In Pinkston v. Teletronics, Inc., 4 S.W.3d 130 (Ky. 1999), the Supreme Court held as follows:

KRS 342.710(4) authorizes the reasonable cost of "board, lodging or travel" where rehabilitation requires residence at or near a facility which is away from the worker's customary residence. Here, claimant could not avail himself of the vocational rehabilitation services to which he was entitled without making a daily commute of 97 miles. We conclude, therefore, that because the training facility was a significant distance from claimant's customary residence, the payment of mileage would come within the travel expenses contemplated by KRS 342.710(4). See C & L Construction v. Cannon, Ky., 884 S.W.2d 647 (1994). We, therefore, affirm the award of mileage expenses for the days upon which claimant attended class.

Dunagan interprets Pinkston to mean travel for vocational rehabilitation of a "significant distance" is compensable. She also analogizes the situation to reimbursement for travel for medical treatment. Though KRS 342.020 does not specifically authorize reimbursement for travel expenses associated with medical treatment, our Supreme Court has interpreted the statute as requiring the employer to pay reasonable travel expenses.

We do not agree with Dunagan's assertions. First, we do not believe KRS 342.710(4) is analogous to KRS 342.020. KRS 342.020 requires the employer to pay for:

the cure and relief from the effects of an injury or occupational disease the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability, or as may be required for the cure and treatment of an occupational disease.

In C. & L. Const. v. Cannon, 884 S.W.2d 647 (Ky. 1994), the Supreme Court determined the direct mandate that the employer pay for the cure, relief and treatment of an injury or occupational disease necessarily includes the cost associated with obtaining such cure, relief and treatment.

The plain language of KRS 342.710 contains no such mandate. Rather, it contains the qualifying language that the issue of travel reimbursement arises only "when rehabilitation requires residence at or near the facility or institution". Because of this language, we also do not interpret Pinkston to mean any travel of a "significant distance" is compensable. Instead, our reading is Pinkston's training facility, located some 45 miles away from his home, is the functional equivalent of being "away" from his customary residence. Stated otherwise, Pinkston satisfied the qualifying language of the provision. The fact he chose to drive this distance, instead of relocating to the site of the training facility, did not derogate his right to reimbursement.

The ALJ accepted Dunagan resides approximately fifteen miles from PJs Cosmetology School. There was no evidence Dunagan relocated her residence to attend the school. The ALJ determined this distance does not constitute training "away from" her customary residence. This determination is reasonable, and we do not believe the ALJ abused his discretion in determining Dunagan did not qualify for reimbursement under KRS 342.710(4).

The final issue raised by Dunagan concerns the ALJ's refusal to award sanctions, costs and attorney's fees

for the unreasonable defense of her claims for rehabilitation benefits, medical treatment and travel. The parties submitted extensive proof surrounding the negotiation of the original settlement and the discussions as to whether vocational retraining benefits would be voluntarily paid. Additionally, Dunagan makes a number of public policy arguments concerning the imposition of sanctions. A detailed recitation of this proof and these arguments is not necessary to our limited review of the issue, which must be confined to the particular facts of this case.

The imposition of sanctions pursuant to KRS 342.310 falls within the discretion of the ALJ. To impose sanctions, the ALJ must determine an action has been brought, prosecuted or defended without reasonable ground. Our review of the appropriateness of costs and attorney's fees is based upon the determination of whether the fact-finder abused his discretion. The Board has consistently utilized the standard set forth by the Kentucky Supreme Court in Roberts v. Estep, 845 S.W.2d 544 (Ky. 1993). The standard set forth in Estep is whether it can be readily conceived the object of the proposed costs was acting in good faith when bringing the action.

We find no abuse of discretion here. As the ALJ noted, Dunagan presented evidence tending to indicate Lancaster Colony unreasonably failed to provide vocational retraining expenses without providing her any justification. However, the ALJ likewise found Lancaster Colony had a reasonable ground for believing it was not responsible for an award of vocational retraining benefits. The employer submitted a prior decision, issued by another ALJ in a different claim, though also litigated by the firm representing Lancaster Colony. In that case, the ALJ specifically interpreted KRS 342.710 to preclude reimbursement of vocational expenses incurred prior to referral by the ALJ for vocational evaluation<sup>1</sup>.

Furthermore, Dunagan was aware Lancaster would not voluntarily pay rehabilitation benefits. Although the parties agreed at settlement to application of the three multiplier pursuant to KRS 342.730(1)(c)1, the standard for eligibility for vocational rehabilitation is different. An employer could reasonably believe a claimant lacked the physical capacity to perform the work she performed at the time of injury yet retained the ability to perform other work for which she had training or experience.

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<sup>1</sup> Claim number 2008-99189 involved a claimant who enrolled in college classes without approval of the state rehabilitation program or the workers' compensation system.

Regarding the claim for sanctions related to medical expenses, the ALJ was not convinced the employer intentionally failed to pay the expenses, noting the expenses were voluntarily paid in the course of the reopening once presented and verified. The ALJ specifically stated his reliance on the testimony of Laura Hilbert, claims adjuster for Lancaster Colony's insurer. Dunagan has presented extensive arguments in her briefs to the ALJ and this Board, concerning the sanctions issue and public policy reasons for the existence of sanctions. Unfortunately for Dunagan, after weighing the evidence and considering the arguments, the ALJ exercised his discretion to conclude the issue in favor of Lancaster Colony. We cannot say the ALJ's refusal to award sanctions, attorney's fees and costs was a clear abuse of discretion.

Accordingly, the February 19, 2013 Opinion and Award of Hon. Grant S. Roark, Administrative Law Judge, the March 8, 2013 Order on Reconsideration, and the March 22, 2013 order denying Dunagan's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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