# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: September 16, 2013**

CLAIM NO. 201101507

KENTUCKY RIVER REGIONAL JAIL PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

RICHARD DILLION
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

and

RICHARD DILLION PETITIONER

V.

KENTUCKY RIVER REGIONAL JAIL
And HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING**

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

**RECHTER, Member.** Richard Dillion ("Dillion") filed a claim alleging he contracted an occupational disease while employed as a deputy jailer at the Kentucky River Regional Jail ("KRRJ") facility. Specifically, Dillion claimed he was continuously exposed to second-hand smoke which caused chronic obstructive pulmonary disease ("COPD"). The Honorable Douglas W. Gott, Administrative Law Judge (the "ALJ") entered an Opinion and Order on March 5, 2013, finding Dillion suffered an injurious exposure, which resulted in no permanent impairment. Both parties filed a petition for reconsideration, which were denied by the ALJ in an order rendered March 28, 2013. Now, KRRJ appeals the ALJ's finding that Dillion's exposure to second-hand smoke constituted an injurious exposure. Dillion cross-appeals, arguing the ALJ erroneously concluded he does not retain any impairment due to injurious exposure. For the reasons set forth herein, we affirm.

Dillion worked as a deputy jailer at KRRJ from 1996 thru 2010. The evidence was uncontroverted that, despite a smoking ban in the facility beginning in 2006, indoor smoking remained pervasive. Dillion testified he has never been a smoker.

He began to experience breathing problems, including shortness of breath, coughing and wheezing while

employed at KRRJ. In 2010, his primary care physician referred him to a pulmonologist, Dr. Firas Koura, who informed Dillion his problems were related to second-hand smoke inhalation. Dr. Koura performed pulmonary function studies that he interpreted as "completely normal" with "no evidence of airflow obstruction." Another study conducted in 2011 yielded similar results.

In 2012, Dillion was evaluated by Dr. Glen Baker at his attorney's request. Based on pre- and post-bronchodilator ventilator studies, Dr. Baker diagnosed COPD. He further opined the condition was work-related:

> Second hand smoke is a known cause of obstructive airway disease and pulmonary conditions. As he has had no other exposures of any particular substance that could cause this condition, I feel the second-hand smoke would have a high probability that it was the cause of his obstructive airway disease and chronic bronchitis.

Relying on the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Baker assigned a 17% impairment rating, but determined Dillion retained the physical capacity to return to work.

At KRRJ's request, Dillion was later evaluated by Dr. Thomas Jarboe, who diagnosed bronchial asthma. He specifically disagreed with the basis of Dr. Baker's COPD

diagnosis; he did not believe the ventilator studies indicated chronic airflow obstruction. Referencing Dr. Koura's pulmonary function studies, Dr. Jarboe noted Dillion's results had consistently remained normal since 2010.

On March 6, 2012, Dillion was seen for a university evaluation by Dr. Steve Kraman of the University of Kentucky. The results of his pulmonary function studies indicated some minor impairment. However, Dr. Kraman believed Dillion had given inadequate effort in the testing:

> [A]ny pulmonary impairment was caused in whole or in part by occupational exposure to second-hand smoke in the patient's work environment. However, the degree of impairment described by Mr. Dillion is very much out of proportion to the minor pulmonary function abnormality noted.

Dr. Kraman also noted that a chest radiograph and CT scan of the chest done in 2010 were unremarkable. He assigned a 0% impairment.

In supplemental reports, Dr. Jarboe responded to the conclusions of Drs. Kraman and Baker. He disputed the results of Dr. Baker's pulmonary function studies, arguing they did not meet standard guidelines for a COPD diagnosis. As to the university evaluation, Dr. Jarboe generally

agreed with Dr. Kraman that the pulmonary function studies did not indicate any obstruction. However, Dr. Jarboe disagreed with Dr. Kraman's conclusion that any minor pulmonary function was related to second-hand smoke exposure in the workplace. Instead, Dr. Jarboe reiterated his belief Dillion suffers only from bronchial asthma, which cannot be attributed within a reasonable degree of medical probability to his workplace.

Ultimately, in the Opinion dated March 5, 2013, the ALJ concluded Dillion had suffered an injurious exposure to second-hand smoke at KRRJ, but assessed a 0% impairment rating pursuant to the AMA Guides. He denied permanent indemnity benefits, but awarded medical benefits. Both parties petitioned for reconsideration, which the ALJ denied.

On appeal, KRRJ challenges the ALJ's conclusion the exposure to second-hand smoke at its facility constituted an injurious exposure. KRS 342.011(4) defines "injurious exposure" as "that exposure to occupational hazard which would, *independently of any other cause whatsoever*, produce or cause the disease for which the claim is made." (emphasis added). KRRJ argues the ALJ failed to make a specific finding the concentration of

second-hand smoke at the jail would *independently* cause COPD.

Going further, KRRJ identifies certain facts in the record which refute the conclusion the facility's second-hand smoke independently caused Dillion's impairment. Dillion testified he was exposed to second-hand smoke as a child. Dr. Kraman stated any pulmonary impairment was caused "in whole *or in part*" by exposure to second-hand smoke. Dr. Baker testified COPD is a disease that can be caused by various irritants. In light of this evidence, KRRJ argues, it cannot be concluded Dillion's exposure at the jail "independently of any other cause whatsoever" caused his pulmonary impairment.

KRS 342.0011(4) requires only that the exposure "would" independently cause the disease, not that the exposure *did in fact* independently cause the disease. "All that is required … is that the exposure be such as *could* cause the disease independently of any other cause." Childers v. Hackney's Creek Coal Co., 337 S.W.2d 680, 683 (Ky. 1960)(emphasis added)(interpreting identical predecessor statute). The Kentucky Court of Appeals has similarly interpreted that provision as requiring proof the received exposure "would have produced or caused the

disease in and of itself regardless of any other exposure." Mills v. Blake, 734 S.W.2d 494, 496 (Ky. App. 1987).

Here, the ALJ found Dillion suffered an injurious exposure, initially relying on Dillion's testimony and Dr. Kraman's opinion. In the subsequent order denying the petition for reconsideration, the ALJ added his reliance upon Dr. Baker's opinion testimony. Dillion's testimony that secondhand smoke was present at the jail was uncontroverted. Dr. Kraman opined any pulmonary impairment was caused "in whole or in part" by Dillion's exposure at the jail. Dr. Baker identified Dillion's exposure at KRRJ as the sole possible cause of his pulmonary impairments.

This evidence is sufficient to establish Dillion's exposure at KRRJ could cause COPD independently of another cause. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2005)(noting ALJ's broad discretion to make a factual determination of causation). Moreover, this proof constitutes the requisite substantial evidence to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984)(where claimant is successful in his burden, question on appeal is whether the ALJ's finding is supported by substantial evidence). The fact KRRJ is able to identify conflicting evidence is unpersuasive. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky.

1974)(mere identification of evidence supporting a different outcome is not an adequate basis to reverse on appeal).

KRRJ also argues the ALJ failed to make a specific finding as to whether COPD is an occupational disease. It emphasizes COPD is not, at least under the particular circumstances of this case, "incidental to the character of the business" or "related to a risk connected with the employment." KRS 342.0011(2)(3).

The correct inquiry is not whether COPD is a risk generally connected with employment as a deputy jailer. Rather, "[w]hether or not a condition is compensable as being an occupational disease under KRS 342.316 depends upon whether the compensation claimant has established that hazards of his employment increased his exposure to the disease he has contracted." National Stores, Inc. v. Hester, 393 S.W.2d 603, 604-5 (Ky. 1965). The focus is on the particular circumstances of the employment, not the occupation: "the test … is not whether the disease is literally peculiar to the occupation but whether there exists a recognizable link between the disease and some distinctive feature of the claimant's job, common to all jobs of that sort." Id. at 605.

There existed sufficient proof for the ALJ to find a "causal connection between the conditions under which the work is performed and the occupational disease." KRS 342.0011(3). Again, the ALJ relied on Dillion's uncontroverted testimony concerning the level of secondhand smoke present at the facility, and the opinions of Drs. Kraman and Baker that secondhand smoke can cause COPD. This proof is of sufficient probative value to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984. *See also* Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986)(to succeed on appeal, objecting party must establish there is no evidence of substantial probative value to support the ALJ's decision).

Dillion cross-appeals, arguing the ALJ erred in concluding he does not retain any impairment due to his occupational disease. The ALJ based this conclusion on Dr. Kraman's opinion. Dillion claims the opinion in this regard is unreliable, because Dr. Kraman suspected inadequate effort. Because Dillion failed to meet his burden of establishing an impairment, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries, id.

The characterization of Dr. Kraman's testing as "invalid" is entirely Dillion's. Dr. Kraman simply noted

"the degree of impairment described by Mr. Dillion is very much out of proportion to the minor pulmonary function noted." Using the AMA Guides, Dr. Kraman classified Dillion's level of impairment due to pulmonary impairment as 0%. A university evaluator's opinion is given presumptive weight. KRS 342.315(2). The ALJ stated he was unpersuaded by any contrary evidence, and he acted well within his discretion in so deciding.

For the foregoing reasons, the March 5, 2013 Opinion and Order rendered by Hon. Douglas W. Gott, Administrative Law Judge and the March 28, 2013 Order on Petitions for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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