

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: August 29, 2014

CLAIM NO. 201200400

TEMA ISENMANN, INC.

PETITIONER

VS.

APPEAL FROM HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

JEFF MILLER  
and HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
VACATING AND REMANDING

\* \* \* \* \*

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

**STIVERS, Member.** Tema Isenmann, Inc. ("TEMA") appeals from the March 24, 2014, "Amended Opinion and Order on Remand" of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding Jeff F. Miller ("Miller") permanent total disability ("PTD") benefits and medical benefits. No petition for reconsideration was filed.

The Form 102 alleges on June 30, 2010, Miller contracted a disease arising out of and in the course of his employment. The occupational disease claimed by Miller is bladder cancer, and he alleges exposure to the disease occurred as follows: "Inspecting material in plant."

By Opinion and Order dated September 13, 2012, the ALJ determined Miller's bladder cancer was causally related to exposure to the MOCA chemical and awarded PTD benefits and medical benefits.<sup>1</sup>

TEMA appealed the September 13, 2012, Opinion and Order asserting several arguments and sub-arguments, one of which was the ALJ committed error by denying a university evaluation.

In a January 11, 2013, Opinion Vacating and Remanding, this Board, in relevant part, stated as follows:

Miller filed a Form 102, Application for Resolution of Occupational Disease Claim, on March 29, 2012, alleging he contracted bladder cancer with a manifestation date of June 30, 2010 from exposure to MOCA<sup>2</sup>, a chemical compound, while working for TEMA. In support of the claim, Miller filed the January 24, 2010 report of Dr. John Rinehart, an oncologist at the University of Kentucky, Markey Cancer Center. Dr. Rinehart opined Miller had contracted, "prostatic urothelial carcinoma, papillary high-grade type,

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<sup>1</sup>4,4' - Methylene bis (2-Chloroaniline[MOCA]).

stage T2c, pN0, M0". Dr. Rinehart stated there was a greater than fifty percent chance the cancer was caused by exposure to MOCA.

Miller filed additional medical records of Dr. Rinehart, along with supplemental lay and medical testimony. Miller testified by deposition on June 5, 2012, and at the hearing held August 29, 2012.

On March 30, 2012, Hon. Dwight T. Lovan, the Commissioner of the Kentucky Department of Workers' Claims ("Commissioner") issued a notice stating no first report of injury had been filed. On the same date, the Commissioner issued a notice indicating Miller had filed an occupational disease claim on March 29, 2012. A scheduling order was issued on April 18, 2012, assigning the claim to the ALJ, and setting a Benefit Review Conference ("BRC") on August 8, 2012, in Lexington, Kentucky. TEMA's counsel filed a notice of representation on April 23, 2012. On June 5, 2012, TEMA filed and a Form 111, Notice of Claim Denial or Acceptance, denying Miller's condition was caused by his employment.

KRS 342.316(3)(b)(4)b requires an evaluation to be performed at a facility selected by the executive director (now Commissioner), in all occupational disability claims. While section (3)b specifically outlines the medical standards necessary for establishing pneumoconiosis resulting from exposure to coal dust, it also contemplates other occupational diseases, as indicated in section (4)c. We therefore believe the following procedure is applicable in all occupational disease claims. Specifically, that portion of the statute does not limit itself to coal

worker's pneumoconiosis claims, and states as follows:

4. The procedure for determination of occupational disease claims shall be as follows:

a. Immediately upon receipt of an application for resolution of claim, the commissioner shall notify the responsible employer and all other interested parties and shall furnish them with a full and complete copy of the application.

b. The commissioner shall assign the claim to an administrative law judge and, except for coal workers' pneumoconiosis claims, shall promptly refer the employee to such physician or medical facility as the commissioner may select for examination. The report from this examination shall be provided to all parties of record. The employee shall not be referred by the commissioner for examination within two (2) years following any prior referral for examination for the same disease.

c. Except for coal workers' pneumoconiosis claims, within forty-five (45) days following the notice of filing an application for resolution of claim, the employer or carrier shall notify the commissioner and all parties of record of its acceptance or denial of the claim..

(Emphasis added)

Similarly, KRS 342.315(1) directs the executive director (now commissioner) to "contract with the University of Kentucky and the University of Louisville medical schools to evaluate workers who have had injuries or become affected by occupational diseases covered by this chapter."

In addition to the foregoing statutory language, 803 KAR 25:010(6)3 states, "For all occupational disease and hearing loss claims, the executive director shall promptly schedule an examination pursuant to KRS 342.315 and 342.316." 803 KAR 25:010(11)1 states as follows:

All persons claiming benefits for hearing loss or occupational disease other than coal worker's pneumoconiosis shall be referred by the commissioner for a medical evaluation in accordance with contracts entered into between the executive director and University of Kentucky and University of Louisville medical schools.

In this instance, the Commissioner failed to refer Miller for an evaluation as required by both statute and regulation. On July 11, 2012, TEMA requested an evaluation be performed pursuant to KRS 342.315. Miller responded, and in the BRC Order and Memorandum, the ALJ denied the request. On August 21, 2012, TEMA filed a petition for reconsideration again asking the ALJ order the evaluation. This request was denied by order entered

September 10, 2012. TEMA again requested an evaluation in the petition for reconsideration filed September 25, 2012. This request was denied by order entered October 15, 2012.

As trier of fact, the ALJ is the gatekeeper and arbiter of the record both procedurally and substantively. For purposes of KRS Chapter 342, it has long been accepted the ALJ has the authority to control the taking and presentation of proof in a workers' compensation proceeding in order to facilitate the speedy resolution of the claim and to determine all disputes in a summary manner. Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283 (Ky. 2005); Yocum v. Butcher, 551 S.W.2d 841 (Ky. App. 1977); Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991); Searcy v. Three Point Coal Co., 134 S.W.2d 228, 231 (Ky. 1939).

However, in this instance we believe the scheduling of an evaluation in all occupational disease claims is mandatory. When Miller was not referred by the Commissioner for an evaluation, the ALJ was required to do so. While an evaluation may or may not alter the outcome of the claim, we believe it is procedurally required. We are not directing any particular outcome, and are not attempting to substitute our judgment for that of the ALJ.

We therefore vacate and remand the ALJ's opinion and order on reconsideration. On remand, the ALJ shall order a university evaluation pursuant to KRS 342.315, as required by KRS 342.316(3)(b)(4)b. Once the university evaluation is completed, the ALJ shall order further proceedings accordingly. This shall include a reasonable period of time for the

introduction of evidence for all parties after the university evaluation report has been filed. Again, we express no opinion herein regarding the outcome of Miller's claim or whether he may ultimately prevail on the merits. However, we believe KRS 342.316(3)(b)(4)b, 803 KAR 25:010(6)3, and 803 KAR 25:010(11)1 mandate a university evaluation be performed pursuant to KRS 342.315.

On February 15, 2013, the ALJ entered an "Amended Opinion and Order on Remand - University Evaluation Referral Order" directing Miller to attend a university evaluation.

On February 21, 2013, the ALJ entered the following order:

On February 15, 2013 the Administrative Law Judge rendered an Amended Opinion and Order on Remand - University Evaluation Referral Order in this case. On February 20, 2012 [sic] the Medical Services Section of the Department of Workers' Claims notified the undersigned that there are no university evaluators available for this case at either the University of Kentucky or the University of Louisville. For that reason, an university evaluation is not possible.

The Medical Services Section of the Department of Workers' Claims has suggested to the undersigned that I recommend that the attorneys agree on an independent medical evaluator. I, therefore, am ordering the attorneys to confer and then make a joint telephone call to the undersigned so that this matter may be resolved as soon as possible.

On June 3, 2013, TEMA filed a "Motion for Extension of Time to Designate Competent Medical Specialist(s)" in which it noted that in a telephone conference, the ALJ suggested that the parties designate three specialists from which the ALJ will choose. It further stated that it has been unable to locate physicians specializing in oncology and cancer diagnosis and treatment who would be willing to render an opinion in this case. TEMA requested an extension of time to find such specialists.

By order dated June 7, 2013, the ALJ overruled TEMA's motion for an extension of time and ordered Miller submit to a medical examination by Dr. David Jackson.

On June 19, 2013, TEMA filed a "Petition for Reconsideration Objection to Designation of Dr. Jackson" objecting to the designation of Dr. Jackson and asserting "it is for the Commissioner to determine how to proceed with the appointment of an evaluator."

By order dated July 2, 2013, the ALJ denied TEMA's petition for reconsideration.

In the March 24, 2014, amended opinion and order on remand, the ALJ provided the following procedural history:

Plaintiff filed a Form 102 on March 29, 2012 alleging that he became affected with a work-related

occupational disease (bladder cancer) on June 30, 2010. Defendant filed a Form 111 on June 5, 2012 denying the claim. The Benefit Review Conference was held on August 8, 2012 and the Final Hearing was held on August 29, 2012. On September 13, 2012 I rendered an Opinion and Order awarding to the plaintiff Mr. Miller income benefits and medical benefits. Thereafter, the defendant filed a Petition for Reconsideration, which was overruled and denied by Order entered on October 15, 2012.

Defendant appealed to the Workers' Compensation Board and on January 11, 2013 the Workers' Compensation Board entered an Opinion Vacating and Remanding to me and directing that I order an university evaluation pursuant to KRS 342.316(3)(b)(4)b, 803 KAR 25:010(6)3, 803 KAR 25:010(11)1 and KRS 342.315.

On February 15, 2013 I entered an Interlocutory Opinion and Order directing the university evaluation. On February 20, 2013 the Medical Services Section of the Department of Workers' Claims notified me that there are no university evaluators available for this case at either the University of Kentucky or the University of Louisville, and that, therefore, a university evaluation is not possible. The Medical Services Section of the Department of Workers' Claims suggested that I recommend to the attorneys that they agree on an independent medical evaluator. By Order dated February 21, 2013, I ordered the attorneys to confer and then make a joint telephone call to me so that this matter could be resolved as soon as possible. Both attorneys and the undersigned had a telephonic conference call on April 23,

2013 and the attorneys advised me that they were unable to agree upon a physician. The plaintiff submitted the names of three physicians to perform the evaluation. The defendant did not submit the names of any physicians to perform the evaluation. By Order dated June 7, 2013, I entered an Order directing the plaintiff to undergo a medical evaluation by Dr. David Jackson, one of the physicians submitted by the plaintiff, and directed that Dr. Jackson schedule an examination of the plaintiff as soon as possible at the expense of the defendant. The defendant objected to the designation of Dr. Jackson to perform the evaluation and the plaintiff responded thereto.

A telephonic conference call involving the attorneys and the undersigned was held on January 3, 2014, and both attorneys agreed to waive the Final Hearing. The attorneys further agreed that a mediation conference be conducted by former Judge Donna Terry at the expense of the defendant. The attorneys agreed that they should have additional time to introduce evidence. The attorneys further agreed that if the case was not settled at the mediation conference, they should submit concurrent Briefs within 45 days from and after January 3, 2014, at which time the case would be submitted for decision. The prescribed time has expired, and the attorneys have filed concurrent Briefs. The case is ready for decision.

After listing the stipulations, identifying the contested issues, and summarizing the evidence, the ALJ

provided the following findings of fact and conclusions of law:

"Workers' compensation is a very important field of law. If not the most important. It touches more lives than any other field of the law. It involves the payments of huge sums of money. The welfare of human beings, the success of business, and the pocketbooks of consumers are affected daily by it." --- comment by Judge E. R. Mills in *Singletary v. Mangham Construction*, 418 So.2d 1138 (Fla.1<sup>st</sup> DCA, 1982).

**A. Average weekly wage.**

Based upon the sworn testimony of the plaintiff Mr. Miller to the effect that at the time he was last exposed to the alleged harmful chemical, his gross annual salary was \$60,000.00, which computes to be an average weekly wage of \$1,153.84 pursuant to KRS 342.140(1), and I make that factual determination.

**B. Injury as defined by the Act, causation and work-relatedness.**

KRS 342.0011(2) defines "occupational disease" to mean a disease arising out of and in the course of the employment. KRS 342.0011(3) states that an occupational disease as defined in this chapter shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident to the work as a result of the exposure occasioned by the nature of

the employment and which can be fairly traced to the employment as the proximate cause.

I saw and heard the plaintiff Mr. Miller testify at the Final Hearing. I carefully observed his facial expressions during his testimony. I listened carefully to his voice tones during his testimony. I carefully observed his body language during his testimony. I make the factual determination that Mr. Miller was a credible and convincing lay witness.

This case calls to mind the Opinion of the Kentucky Court of Appeals in Jeffries v. Clark & Ward, 2007 WL 2343805 (Ky.App.2007), where the Court of Appeals quoted from Chief Judge Overfield's Opinion in the case, in which he made the following statement . . . "It is often difficult to explain to litigants and counsel why one witness is considered credible and another is not considered credible. No doubt many of the factors related to the credibility by a trier of fact are subconscious and many are related to life experiences" (emphasis supplied). The Court of Appeals stated that it was within the Judge's sole discretion to determine the quality, character, and substance of the evidence, and the Court of Appeals did not disturb Judge Overfield's determination that one witness was not credible, despite the fact that Judge Overfield used his "life experiences" in making that determination.

The plaintiff's treating oncologist at the University of Kentucky Medical Center, Dr. Rinehart, filed a very persuasive and compelling medical report. Dr. Rinehart stated that Mr. Miller's long term exposure to

MOCA, a carcinogen with highly toxic effects, convinced him that a high probability existed, greater than 50%, that Mr. Miller's bladder cancer was induced by his work exposure to MOCA. The Kentucky law of evidence requires that a physician's opinion be based upon reasonable medical probability as contrasted with possibility, which is not adequate. *Rogers v. Sullivan*, 410 S.W.2d 64 (Ky.1966); *Gilbreath v. Perkins*, 461 S.W.2d 360 (Ky.1970); and *Seaton v. Rosenberg*, 573 S.W.2d 333 (Ky.1978).

Based upon the credible and convincing sworn testimony of Mr. Miller and the very persuasive and compelling medical evidence from Dr. Rinehart, the treating oncologist, I make the factual determination that Mr. Miller's long-term exposure to MOCA during his employment with the defendant from 1995-2010 caused and brought about his bladder cancer, for which he was treated by Dr. Rinehart.

**C. Extent and duration.**

In rendering a decision, KRS 342.285 grants the Administrative Law Judge as fact-finder the sole discretion to determine the quality, character and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky.2008). In this case, I find very credible and convincing the sworn lay testimony of Mr. Miller and very persuasive and compelling the evidence from his treating oncologist, Dr. Rinehart, which is covered in detail above. I also find very persuasive and compelling the medical report of Dr. Burke, which is covered in detail above, Dr. Burke noted Mr. Miller's diagnosis of bladder cancer and his surgery consisting of bladder excision

and later chemotherapy. After conducting a thorough physical examination of Mr. Miller, Dr. Burke, using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, found that due to Mr. Miller's bladder disease he will sustain a 40% whole person impairment and that using the criteria for permanent impairment rating for a herniation, Mr. Miller will sustain a 30% whole person impairment. Dr. Burke further stated that using the Combined Values Chart Mr. Miller will sustain a 58% whole person permanent impairment. Dr. Burke further stated that he did not believe that Mr. Miller will be able to work at any physical activities and has significant limitations regarding his activities of daily living, being very homebound. Dr. Rinehart, the plaintiff's treating oncologist, stated that Mr. Miller has reached maximum medical improvement, and further that the plaintiff is unable to work and that he does not see Mr. Miller improving. I found the medical evidence from Dr. Rinehart regarding Mr. Miller's physical limitations to be very persuasive and compelling.

As the fact-finder, the Administrative Law Judge has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993); *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). The Administrative Law Judge also has the sole authority to judge the weight to be afforded to the testimony of a particular witness. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). When conflicting evidence is presented, the Administrative Law Judge may choose

whom or what to believe. *Pruitt v. Bugg Bros.*, 547 S.W.2d 123, 125 (Ky. 1977). Furthermore, the ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000).

"'Permanent total disability' means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury . . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

"the ALJ must necessarily consider the worker's medical condition . . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."

*Id.* at 52. (Internal citations omitted.) Also, a worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured. *Id.*; see also,

*Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

As indicated above, I saw and heard Mr. Miller testify at length at the Final Hearing. He was a credible and convincing lay witness. His testimony rang true. I make the factual determination that as a result of Mr. Miller's work-related injuries, which he sustained while employed by the defendant, and his physical limitations, which are covered in detail above, that he had a good work history showing a good work ethic. I make the factual determination that Mr. Miller's testimony that he has no energy, cannot walk up his basement steps, does not have enough energy to play with his grandchildren, and can no longer do any recreational activities, is very credible and convincing. Based upon the credible and convincing testimony of Mr. Miller and the persuasive and compelling medical evidence from Dr. Rinehart and Dr. Burke, I make the factual determination that due to Mr. Miller's bladder cancer and his subsequent surgery and physical impairments, which are severe, his work history and the medical prognosis from Dr. Rinehart and Dr. Burke, Mr. Miller cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled as a result of the occupational disease which he contracted while employed by the defendant.

**D. Medical benefits.**

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.

I, therefore, find that the defendant and/or its workers' compensation insurance carrier is responsible for the payment of Mr. Miller's work-related medical bills and expenses, both past and future.

**E. Safety violation.**

KRS 342.165(1) provides that 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 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 30% in the amount of each payment.

I do not find in the record in this case any clear and convincing expert evidence showing that the defendant intentionally failed to comply with any specific safety statute or regulation which caused or brought about the plaintiff's occupational disease.

I, therefore, make the factual determination that the plaintiff is not entitled to recover the 30% penalty from the defendant.

No petition for reconsideration was filed.

On appeal, TEMA makes five arguments. First, it contends the ALJ's opinion and award is not based on substantial evidence. Second, it maintains the evidence compels a finding Miller was not exposed to the MOCA chemical. Third, it argues Miller's testimony cannot constitute substantial evidence of exposure to the MOCA chemical. Fourth, TEMA asserts Dr. Rinehart's report does not comprise substantial evidence in support of exposure to the MOCA chemical. Finally, TEMA asserts the ALJ erred in failing to direct the Commissioner to provide a university evaluation pursuant to the statute.

We first address TEMA's last argument, as this Board's decision renders moot the remainder of TEMA's arguments on appeal. In its final argument on appeal, TEMA asserts the case must be remanded to the ALJ and the Commissioner requested to provide a University evaluation as mandated by statute. We agree.

As an initial matter, we must address the fact there is nothing in the record that memorializes the conversation between the Medical Section Services of the Department of Workers' Claims and the ALJ regarding the status of obtaining the services of a university evaluator. In the February 21, 2013, order, the ALJ indicates he was "notified...there are no university evaluators available

for this case at either the University of Kentucky or the University of Louisville." However, with something as critical as a university evaluation, this is insufficient to support the subsequent actions of the ALJ. We do not question the accuracy of the ALJ's order; however, his actions must be supported by the record. Here, we are unable to discern the content of the communication from the Medical Services Section of the Department of Workers' Claims. Thus, the decision must be vacated and the claim remanded for the ALJ to file a letter from the Department that memorializes, with specificity, the availability, or lack thereof, of university evaluators in this litigation.

In addition, when no university evaluator is willing or available to evaluate Miller, the Commissioner shall choose a physician for the evaluation. Pursuant to KRS 342.316(3)(b)(4), "[t]he procedure for determination of occupational disease claims shall be as follows." (emphasis added.) KRS 342.316(3)(b)(4)(b) continues as follows:

The executive director shall assign the claim to an administrative law judge and, except for coal workers' pneumoconiosis claims, shall promptly refer the employee to such physician or medical facility as the executive director may select for examination.

Use of the word "shall" is clearly indicative of legislative intent and the mandatory nature of this regulation. Alexander v. S & M Motors, Inc., 28 S.W.3d 303 (Ky. 2000). Therefore, the Commissioner, not the ALJ, must choose a physician that will stand in the stead of the university evaluator in the event no university evaluator is willing or available to evaluate Miller. On remand, the ALJ must request the Commissioner to choose a physician who will conduct an independent examination in place of the university evaluator. The ALJ's failure to follow the statutory mandate in KRS 342.316(3)(b)(4)(b) and request the Commissioner to choose a physician who will act in place of the university evaluator constitutes an abuse of discretion. In discharging rulings as both gatekeeper of the record and fact-finder, an ALJ may not act in an arbitrary or unreasonable manner such as to indicate an abuse of discretion. Yocom v. Butcher, 551 S.W.2d 841 (Ky. App. 1977).

Consequently, the ALJ's award in the March 24, 2014, "Amended Opinion and Order on Remand" must be vacated. The claim will be remanded for introduction of the appropriate correspondence in the record from the Medical Services Section of the Department of Workers' Claims regarding the availability of a university evaluator. If a

university evaluator cannot be obtained, the ALJ is to request the Commissioner to designate a physician to conduct the medical evaluation as mandated by KRS 342.316(3)(b)(4)(b). Finally, once the medical evaluation has been carried out, the ALJ must decide the case on its merits.

Accordingly, the ALJ's award of PTD benefits and medical benefits is **VACATED** and this case is **REMANDED** for further proceedings consistent with the views expressed herein.

ALL CONCUR.

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