Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 11, 2015

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
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Tema Isenmann, Inc. ("TEMA") appeals from the Amended Opinion and Order on Remand rendered March 20, 2015 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding Jeff Miller ("Miller") permanent total disability ("PTD") and medical benefits after determining

his exposure to MOCA[1] during his employment with TEMA caused bladder cancer. No petition for reconsideration was filed.

On appeal, TEMA argues substantial evidence does not support the ALJ's decision. It argues the evidence compels a finding Miller was not exposed to MOCA during his employment, and Miller's testimony and the report of Dr. John Rinehart cannot constitute substantial evidence. TEMA argues the ALJ erred in failing to direct the Commissioner to provide a university evaluation pursuant to statute. Because the ALJ complied with the directives of this Board and the Commissioner has met the requirements of KRS 342.315 and 342.316, and the decision is supported by substantial evidence in the record, we affirm.

We will first address TEMA's last argument.

I. University Evaluation Pursuant to KRS 342.315 and 316.

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 due to exposure to MOCA, a chemical compound, while working for TEMA. Hon. Dwight T. Lovan, Commissioner of the Kentucky Department of Workers' Claims

[1] 4,4' –Methylene-bis(2-Chloroaniline).

("Commissioner") assigned the claim to the ALJ, but did not refer Miller for a medical evaluation pursuant to statute. TEMA requested an evaluation be performed pursuant to KRS 342.315, which was denied by the ALJ in a Benefit Review Conference ("BRC") Order and Memorandum. On two more occasions, TEMA requested the ALJ to order the evaluation in petitions for reconsideration, both of which were denied by orders entered September 10, 2012 and October 15, 2012.

In an Opinion rendered January 11, 2013, this Board vacated and remanded the claim. After reviewing the language of KRS 342.316(3)(b)(4)b, KRS 342.315(1) and 803 KAR 25:010(6)3 and (11)1, the Board held the scheduling of an evaluation in all occupational disease claims is mandatory. On remand, the Board directed the ALJ to order a university evaluation pursuant to KRS 342.315, as required by KRS 342.316(3)(b)(4)b.

On February 21, 2013, the ALJ entered an order stating the Medical Services Section of the Department of Workers' Claims ("DWC") notified him there are no university evaluators available for this case at either the University of Kentucky or the University of Louisville, and suggested the ALJ recommend the attorneys agree on an independent medical evaluator. Therefore, the ALJ ordered the attorneys to confer, and to schedule a telephonic conference.

On June 3, 2013, TEMA filed a "Motion for Extension of Time to Designate Competent Medical Specialist(s)" noting in a telephone conference held April 23, 2013, the ALJ suggested each party propose three specialists from which the ALJ will choose. TEMA was unable to locate physicians specializing in oncology, cancer diagnosis, and treatment who would be willing to render an opinion in this case, and requested an extension of time. By order dated June 7, 2013, the ALJ overruled TEMA's motion and ordered Miller submit to a medical examination by Dr. David Jackson. TEMA filed a Petition for Reconsideration 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." The ALJ denied TEMA’s petition in an order dated July 2, 2013.

Following the submission of Dr. Jackson’s report and deposition testimony, as well as a rebuttal report prepared by Dr. Michael Hallet, the ALJ rendered an Amended Opinion and Order on Remand on March 24, 2014. The ALJ provided a procedural history, and summarized the February 20, 2013 conversation with the Medical Services Section of the DWC notifying him of the unavailability of a university evaluator. After reviewing the evidence, the ALJ awarded Miller PTD benefits and medical benefits for bladder cancer.

TEMA appealed, asserting several arguments including the ALJ erred in failing to direct the Commissioner to provide a university evaluation pursuant to the statute.

In an Opinion Vacating and Remanding rendered August 29, 2014, this Board first requested the ALJ file a letter from the DWC memorializing the availability of university evaluators in this litigation. The Board provided the following additional analysis:

> 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. . . .
>
> 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.

Subsequently, the ALJ filed an email dated February 20, 2013 from Mrs. Shari Lafoe from the DWC, Medical Services Section. The email states as follows:

> We received the "AMENDED OPINION AND ORDER ON REMAND – UNIVERSITY EVALUATION REFERRAL ORDER", this morning concerning Mr. Miller. We received the initial filing of the 102 April 2, 2012 to schedule for an evaluation, and prior to the assignment of an ALJ.
>
> It was referred to both UK and UL but there was no one at either University to evaluate the claimant. Since an ALJ had not yet been assigned to the claim,

> Sherry Wilson notified the CALJ's office there was no one to see Mr. Miller. It was decided at the time, that upon assignment to an ALJ that notation be made in the file that a University evaluation would not be possible and to immediately confer with the parties concerning an agreed independent medical evaluation.
>
> There is still no one at either University to evaluate Mr. Miller.

In addition, the Commissioner prepared an order dated March 18, 2015. The Commissioner stated as follows:

> This matter was referred to the Commissioner for the scheduling of a medical examination pursuant to KRS 342.315 and KRS 342.316. Plaintiff has alleged an occupational disease and a University Evaluation is considered mandatory. The [ALJ] found no evaluation available and proceeded to dicide [sic] the claim. The Workers' Compensation Board held the record did not reflect whether a University Evaluator at the direction of the Commissioner and pursuant to statute had been appropriately sought.
>
> Upon remand, the Commissioner was directed to schedule an examination pursuant to KRS 342.315 at the University of Kentucky or University of Louisville medical schools. Efforts by Department personnel have proven unsuccessful, and it is asserted by the Commissioner that the scheduling of a University Evaluation in accordance with KRS 342.315 is not possible. Each medical school has told Department personnel and the Commissioner they have no physicians who can or will conduct an examination and offer an opinion related to Mr. Miller's medical condition. Further, Department personnel at the direction of the Commissioner and the Commissioner

> personally have attempted to identify and engage a physician who could satisfy the requirements of KRS 342.316 and the needs of this claim to examine and offer appropriate opinions related to Mr. Miller's condition. Physicians have been identified, but each has declined to participate as needed.
>
> **IT IS THEREFORE CONCLUDED AS FOLLOWS:**
>
> 1. That a University Evaluation pursuant to KRS 342.315 is impossible and cannot be scheduled;
>
> 2. That an independent examination pursuant to KRS 342.316 cannot be obtained; and
>
> 3. That further delay in deciding the claim of Mr. Miller is unreasonable and the matter should proceed to a conclusion in the interest of justice.

The ALJ rendered a second "Amended Opinion and Order on Remand," on March 20, 2015. The ALJ found the case ready for decision pursuant to the Commissioner's March 18, 2015 order. After summarizing the evidence, the ALJ determined Miller's long-term exposure to MOCA during his employment with TEMA caused bladder cancer, and he awarded PTD and medical benefits. No petition for reconsideration was filed.

It is clear the ALJ followed the Board's directives by introducing the e-mail correspondence in the record from the Medical Services Section of the DWC indicating there is no physician at either university able

to evaluate Miller. The ALJ additionally requested the Commissioner to designate a physician pursuant to this Board's directive. In response, the Commissioner stated efforts by the DWC to schedule an examination pursuant to KRS 342.315 at the University of Kentucky or University Louisville were unsuccessful. The Commissioner also attempted to identify and engage a physician able to satisfy the requirements of KRS 342.316, however, each have declined to participate. The Commissioner concluded a university evaluation pursuant to KRS 342.315 and an independent examination pursuant to KRS 342.316 were both unobtainable, and the matter should proceed to conclusion.

After careful review of the record, we also find the Commissioner fulfilled his duties mandated by KRS 342.315 and 342.316 and the regulations. KRS 342.315 states, "the commissioner shall contract with the University of Kentucky and the University of Louisville medical schools to evaluate workers who have had injuries or become affected by occupation disease. . . " The procedure for determination of occupational disease claims is outlined in KRS 342.316(3)(b)(4). That statute states the Commissioner shall assign the claim to an ALJ and, with exception of coal workers' pneumoconiosis claims, "shall promptly refer the employee to such physician or medical facility as the

executive director may select for examination." Similarly, the regulations mandate the Commissioner to promptly schedule an examination pursuant to KRS 342.315 and 342.316, and refer all occupational disease claimants for a medical evaluation in accordance with contracts entered into between the Commissioner and the University of Kentucky and University of Louisville medical schools. *See* 803 KAR 25:010(6)3 and (11)1.

The March 18, 2015 order prepared by the Commissioner evidences his compliance with the statute and regulations by demonstrating his unsuccessful attempts to refer Miller to a university evaluator and then to an independent medical evaluator. The statute and regulations do not mandate a university evaluator or independent medical evaluator to perform an examination in spite of his or her unwillingness to do so.

Because the ALJ complied with the directives of this Board and the Commissioner met the requirements of KRS 342.315 and 342.316 in referring Miller to a university evaluator and independent medical evaluator, we affirm the ALJ's determination the case was ready for decision based upon the evidence in the record.

II. Occupational Disease

Miller testified by deposition on June 5, 2012 and at the hearing held on August 29, 2012. Miller was born in 1943 and was 69 years of age at the time of the hearing. He earned a Bachelor's degree in Business Administration. Miller worked for TEMA as a purchasing agent or manager from 1995 until he retired on June 30, 2010, which is also his last date of exposure. Following his retirement, Miller began noticing problems with urination in October 2010, which he reported to his family physician, Dr. Baxter Napier. Dr. Napier referred Miller to a specialist. Subsequently, Miller was diagnosed with bladder cancer. Miller had his bladder removed in January 2011, which required a thirty day hospital stay. Thereafter, Miller completed several rounds of chemotherapy and he continues to see his treating physicians for frequent follow-ups appointments.

Miller testified TEMA, a worldwide company, manufactures screens for the aggregate industry, and ships finished products to coal companies and rock quarries. MOCA is a curing agent used in the manufacturing process. The building in which he worked contained offices in the front and manufacturing in the back. Miller worked in an office, which had a door which opened directly into the plant area.

Miller testified he did all the purchasing for TEMA since 1995, including the chemicals used in the manufacturing of the screens. On a daily basis, Miller checked supplies and inventory levels, and ordered stock to include screens, steel needed to manufacture screens, stock steel and office supplies. Miller also did inside sales work. Although Miller agreed he had an “office-type job” he went into the plant to complete his inventory duties and ensure screens were available to customers on a daily basis. Miller estimated he spent on average thirty minutes to an hour each day in the plant. He inventoried finished product, steel, raw steel, and chemicals, including polyurethane and MOCA. Miller testified the MOCA was in pellet form, and kept in storage containers until used in the manufacturing process. Miller stated the storage containers were “mixed in with everything else.”

Miller testified TEMA used an older machine to manufacture screens. During this time, plant employees used boxer cutters to open bags of MOCA pellets and poured them into the machine’s melter. Approximately seven years ago, TEMA purchased a new melter. The entire storage container was placed inside the machine before the MOCA was melted and mixed with polyurethane.

Miller acknowledged he did not touch MOCA in either the pellet form or the mixture. His office did not contain chemical agents or any materials used to manufacture the screens. However, Miller stated MOCA is airborne and he came into contact with it when he handled the screens, testifying as follows at his deposition:

> A: You touch it, yes, because when you touch a screen, you're touching MOCA.
>
> Q: Okay. So when would you touch screens.
>
> A: Every time you lifted one.
>
> Q: Okay. Why would you be lifting them?
>
> A: Putting them on a shelf, picking them up to ship them.
>
> Q: Okay. Because you were dealing with the inventory, correct?
>
> . . . .
>
> A: Yes.
>
> Q: You would never deal with the pellets or anything inside the MOCA container, though, correct?
>
> A: No.
>
> Q: Okay. Clarify then, please.
>
> A: It's airborne.
>
> Q: There's MOCA in the air in the plant.
>
> . . . .

A: Yes.

Q: How do you know that?

A: Because anytime that you pour something into a machine, you're going to have some kind of airborne product.

Miller indicated he knew of his exposure to MOCA from working at TEMA and from "common sense." He acknowledged he was neither trained on the machines nor involved in safety management. Miller does not have a background in engineering or chemistry, nor certification or training pertaining to MOCA.

Miller testified TEMA tested the urine of employees who dealt directly with MOCA in the plant, but not office employees. Miller alleged the results were positive on many occasions. Miller stated the machine using MOCA was not in a regulated area, but was "out in the middle of the floor." To his knowledge, TEMA neither issued a safety manual regarding MOCA, nor required its machine operators to wash their hands, wear protective clothing or use shoe covers. Likewise, when he entered the plant from his office, he was not required to wear protective clothing or shoe covers. Miller stated the only exhaust ventilation in the plant was from four exhaust fans located in the roof.

Other than one occasion in 2009, Miller is unaware of OSHA testing the air at TEMA.

Prior to his retirement, Miller treated for high blood pressure, atrial fibrillation, diabetes and chronic low back pain with his family physician. He has no family history of cancer. Miller is a former smoker of cigarettes, quitting in 1979. Prior to his cessation, he smoked approximately three packs a day for fifteen years. He currently takes no medication associated with his bladder cancer, and does not experience pain. He is unable to walk short distances or up a flight of stairs without needing rest, and he experiences fatigue and lack of strength. He lacks the energy to play with his grandchildren or engage in his old hobby of woodworking or refinishing furniture.

James Lee Sullivan ("Sullivan") testified by deposition on July 31, 2012. Sullivan has worked for TEMA for twenty-four years, and has been the plant manager since 2001 or 2002. TEMA has approximately forty-five employees, and an eight thousand square foot facility. The offices are located in the west end of the building, including Miller's office, and production is in the west end.

MOCA arrives at the facility in pellet form, and is used as a hardening agent in the screen production process. The MOCA pellets are contained in sealed plastic

bags inside thirty-five gallon drums. Prior to 2003, the machine operator wore disposable sleeves and a respirator. The operator took "the MOCA drum upside down on the forklift, undo the plastic clip on the plastic bag, and the MOCA would be fed down into the melter." Anyone not working on the machine was required to leave the area. In 2003, TEMA purchased a new machine which allowed the machine operator to place the entire drum inside the cabinet of the machine and close the door.

> Then he'd take his hands, through rubber gloves, take the lid off, and then the bag - - there was a plastic bag inside the MOCA container - - he would take the clip off and then with the rubber gloves scrape the MOCA down into the - - the holding tank . . . and then it was sucked into a melter and would melt.

As a result, MOCA is not exposed to air until it is enclosed inside the machine. The machine also has a filter. Once emptied the plastic bag is placed into a garbage bag connected to the machine. The empty drum was taken out and used "as a waste bucket" and stored underneath the mixing head.

Sullivan testified production employees had their urine tested quarterly to monitor their exposure to MOCA. If the results returned abnormal, the affected employee was moved off the machine and into a different department. Once

the urine levels returned to normal, the employee was moved back into production. Sullivan testified office employees, including Miller, were not tested since they did not work around the area using MOCA. Sullivan estimated, throughout his entire tenure with TEMA, only two or three urine tests returned abnormal. In 2009, KOSHA conducted an audit and took air samples of the facility to analyze exposure to hazards, including MOCA. The results were attached as an exhibit with the heading "Employee 8-Hour Time-Weighted Average Monitoring to Determine [MOCA] Exposure." A mold technician was exposed to less than 0.0003 parts per million based on an air sample taken on July 9, 2009.

Sullivan testified Miller was often in shipping and receiving, which is located on the east end of the building. Miller occasionally spoke to Sullivan regarding orders. Miller also inventoried chemicals at the end of the month. The chemicals were stored in the west end of the building. It would take approximately ten to fifteen minutes to count the drums of chemicals, including MOCA which was contained inside a plastic bag within a drum. Sullivan estimated Miller only spent five to ten minutes a day in the plant, and near the area using MOCA on average ten minutes a week. Sullivan testified Miller handled finished screens during the end-of-the-year inventory which

are not dangerous to hold or touch. Sullivan also disagreed with Miller's statement MOCA is airborne in the facility. To his knowledge, no other TEMA employee has been diagnosed with bladder cancer.

Timothy Dold, vice president of TEMA, testified at the hearing the company has never received a citation for improper handling of MOCA by OSHA, and that its facility has never been shut down due to hazardous conditions.

In support of his claim, Miller filed the treatment records from Dr. Napier from October 2010 through October 2011. On his last visit of record on October 10, 2011, Dr. Napier diagnosed status post-surgery and chemotherapy for bladder cancer; status post successful cardioversion of atrial fibrillation; type 2 diabetes; and ongoing fatigue. Dr. Napier's records do not address causation.

Miller also filed the treatment records from University of Kentucky Healthcare, Division of Medical Oncology from April 13, 2011 through September 2011. On April 13, 2011, Drs. Firas Hadin and John Rinehart reviewed Miller's history of bladder cancer and subsequent treatment. They noted Miller "used to work in a chemical factory with documented MOCA exposure. He has a history of 2-pack per day smoking for 15 years. However, he quit smoking 30 years

ago." They noted no documented malignancy in Miller's family history except for skin cancer. Miller was diagnosed with high-grade T1, N3, M0 transitional cell carcinoma of the bladder status post total cystectomy in January 2011. They recommended Miller undergo adjuvant chemotherapy. Miller subsequently underwent four courses of chemotherapy from June 2011 through September 2011.

Dr. John Rinehart, Miller's oncologist, prepared a letter dated January 24, 2012. He diagnosed Miller with "prostatic urothelial carcinoma, papillary high-grade type, Stage T2c, pN0, M0." When asked, with a reasonable degree of medical probability, his opinion as to whether Miller's disease is causally related to his previous work environment, Dr. Rinehart stated as follows: "This patient has a long-term exposure to MOCA. This agent is a carcinogen and has highly toxic effects, and a high probability exists, greater than 50%, that his cancer was induced by this agent." Dr. Rinehart stated Miller is at maximum medical improvement ("MMI"), and is unable to work due to his ileal ureteral conduit, and chemotherapy-related weakness. Dr. Rinehart's curriculum vitae was also introduced.

Miller filed the July 12, 2012 independent medical evaluation of Dr. Frank Burke, an orthopedic surgeon. Dr.

Burke provided the following past medical history: "The patient has no history of previous bladder problems. He does have a history of chronic exposure to a carcinogenic agent MOCA at his factory, where he was a purchasing agent for [TEMA] with regular exposure to the chemical on the floor of the factory." He also noted his history of diabetes, elevated cholesterol, and back problems. He noted his social history is negative for tobacco and drinking.

Dr. Burke performed an examination and reviewed the medical records. Dr. Burke diagnosed high-grade prosthetic urothelial carcinoma with metastatic spread and secondary post-surgical abdominal hernia. Dr. Burke assessed a 40% impairment rating for bladder disease and 30% for herniation, which combined for a 58% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Burke does not believe Miller will be able to return to work in any capacity due his significant ongoing problems in his activities of daily living and chemotherapy-induced weakness, noting he is limited to a very homebound state at this point. Dr. Burke opined Miller is at MMI, and restricted him from walking long distances, lifting any weight except as required for activities of daily living,

climbing, squatting, crawling, and prolonged sitting. Regarding causation, Dr. Burke stated as follows:

> This chemical was probably responsible for inducing the cancer. Medical oncologist, Dr. John Reinhardt, answered that there is a high probability, greater than 50% that the cancer was induced by this agent. I agree.
>
> . . . .
>
> This patient was exposed to a known carcinogen MOCA. According to the Kentucky Occupational Safety and Health Regulations 803 KAR2:320, this patient required the use of a filter to protect the employees from this chemical. No such filter was present. In addition, this patient wore his regular clothes through the factory floor, during which he was exposed to this chemical. The patient was exposed to a chemical that was transported in pellet form, but exposed and transferred into the distribution machine. Unfortunately, excess chemical was then placed back into the containers, which was disposed of in the common garbage dumpster for an additional site of exposure unfortunately.
>
> The patient was not using any protective clothing. There was no regulated area while this chemical was being used. Unfortunately, this patient has more history to follow, because of the large abdominal hernia as a result of his wound dehiscence and spillage of his abdominal contents anteriorly . . . .

Miller filed the August 6, 2013 report of Dr. David Jackson, who also testified by deposition on December 17, 2013. Following an examination, Dr. Jackson diagnosed

Miller with metastatic bladder cancer, history of cervical removal and urostomy; post-operative abdominal wound dehiscence; large abdominal hernia; history of back pain; diabetes; and diabetic neuropathy. Dr. Jackson assessed a 40% impairment rating for the bladder disease and 30% for the abdominal herniation, for a combined 58% impairment rating pursuant to the AMA Guides. Dr. Jackson noted Miller will require ongoing medical management. At his deposition, Dr. Jackson stated he has no opinion as to the cause of Miller's bladder cancer.

TEMA filed the functional capacity evaluation performed by Rick Pounds, M.S., RCEP, FABDA, on August 14, 2012. Mr. Pounds noted a purchasing manager is classified as a sedentary physical demand level by the United States Department of Labor. Subsequent to testing, Mr. Pounds concluded Miller could perform all maximum sedentary and light level Department of Labor requirements.

TEMA also filed the August 18, 2012 report of Mike Ward, a toxicological chemist. He noted the 2009 air sample indicating the exposure to a mold technician operator was less than 0.0003 is well below the established threshold Limit Value of 0.01 for MOCA, and establishes Miller's exposure to airborne MOCA was negligible. He disagreed with the opinions of Drs. Burke and Rinehart regarding causation

of Miller's cancer. Mr. Ward concluded, based on the documents provided to him, there is no scientific basis to support significant exposure of Miller to MOCA based on the 2009 air sample and Sullivan's testimony. While acknowledging MOCA is a potential carcinogenic agent, the correlation to production workers and onset of bladder is inconclusive. Mr. Ward found other factors present in Miller's life have been directly linked to an increased risk of bladder cancer. Also being a white male, over forty years of age, increases the risk of developing bladder cancer. Therefore, Mr. Ward concluded the root cause of Miller's bladder cancer cannot be associated with exposure to MOCA.

TEMA also filed the August 27, 2012 report by Dr. James Lockey, a specialist in pulmonary medicine. Dr. Lockey reviewed the records, Miller's job tasks as a purchaser for TEMA, and his history of diabetes and smoking. Dr. Lockey concluded as follows:

> [I]t is my opinion within a reasonable degree of medical probability and certainty that Mr. Miller's bladder cancer was related to his previous history of cigarette smoking as well as diabetes. There is no objective evidence that in fact Mr. Miller was occupationally exposed to MOCA at a level that would have put him at risk for bladder cancer. Dr. Rinehart and Dr. Burke's conclusions that Mr. Miller

> was exposed to MOCA was based apparently on the medical history provided by Mr. Miller and not based on the more objective data of Mr. Miller's job title and job tasks at his place of employment, environmental control measures in place at the plant as mandated by the State of Kentucky, and the available airborne exposure management. One additional factor that may have played a role in Mr. Miller's bladder cancer is his past history of wood working and refinishing furniture.

TEMA filed the December 19, 2013 medical records review report prepared by Dr. Michael Hallet, an urologist from Columbus, Ohio. Dr. Hallet reviewed the record, as well several risk factors associated with bladder cancer. Dr. Hallet concluded as follows:

> I conclude that there is insufficient evidence to state that Mr. Miller's bladder cancer was related to work place exposure. More likely than not the avoidable role of cigarette smoking and the unavoidable roles of age, sex, race, diabetes, and diabetic medication played a major role in this unfortunate situation. More likely than not the role of MOCA did <u>not</u> play a medically probable role in this case of bladder cancer.

In the March 20, 2015 Amended Opinion and Order on Remand, the ALJ provided a procedural history of the claim, and brief summaries of the evidence of record. The ALJ first determined Miller's average weekly wage at the time of his last exposure was $1,153.84 pursuant to KRS 342.140(1).

Under the section titled, “Injury as defined by the Act, causation and work-relatedness,” the ALJ provided the relevant analysis:

> 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 than 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.
>
> . . .
>
> 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.

The ALJ assessed a 58% impairment rating pursuant to Dr. Burke's assessment of impairment. The ALJ ultimately found Miller permanently totally disabled, citing to Drs. Burke and Rinehart's opinions he is unable to return to work, and Miller's testimony regarding his limitations as a result of his disease and chemotherapy. Therefore, based upon Miller's testimony and the opinions of Drs. Burke and Rinehart, the ALJ determined Miller is unable to work consistently or dependably under regular circumstances and is permanently totally disabled as a result of the occupational disease he contracted while employed by TEMA. The ALJ found the safety penalty

violation inapplicable, declining to increase Miller's award by thirty percent. The ALJ awarded Miller PTD benefits commencing June 30, 2010, the last date of exposure, and medical benefits. No petition for reconsideration was filed from the March 20, 2015 Amended Opinion and Order on Remand.

On appeal, TEMA argues the ALJ's opinion is not supported by substantial evidence. Specifically, it argues the ALJ did not adequately address the question of whether Miller was exposed to MOCA. TEMA states the ALJ's opinion is too vague on this issue. TEMA argues Miller's testimony cannot constitute substantial evidence to prove exposure to MOCA since he lacks the competency to testify on this issue. In addition, the ALJ did not point to the specific testimony of Miller of which he found credible and relied upon.

Likewise, TEMA argues Dr. Rinehart's opinion cannot constitute substantial evidence in support of a finding of exposure to MOCA. It asserts Dr. Rinehart's one sentence stating, "The patient has a long term exposure to MOCA," is conclusory and he provides no basis for his determination. In addition, TEMA argues Dr. Rinehart did not have access to Sullivan's deposition testimony, the 2009 air testing results, or to the machine itself. TEMA

also points out Dr. Rinehart did not visit the plant, and did not have any testing demonstrating the presence of MOCA in Miller's system. It also asserts Dr. Rinehart could not rely on Miller's subjective history. Instead, TEMA argues its evidence compels a finding Miller was never exposed to MOCA during his employment.

As the claimant in a workers' compensation proceeding, Miller had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Miller was successful in his burden, the question on appeal is whether substantial evidence existed in the record supporting the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d

329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). 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 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

In addition, no petition for reconsideration was filed from the March 20, 2015 Amended Opinion and Order on Remand. When no petition for reconsideration is filed, the

ALJ's award or order is conclusive and binding as to all questions of fact. KRS 342.285(1). Absent a petition for reconsideration, the issue is narrowed to whether the ALJ's decision is supported by substantial evidence in the record. Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

KRS 342.0011(2) states an occupational disease is a disease arising out of and in the course of the employment. KRS 342.0011(3) states an occupational disease is 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. The occupational disease shall be incidental to the character of the business and not independent of the relationship of employer and employee. An occupational disease need not have been foreseen or expected but, after its contraction, it must appear to be related to a risk connected with the employment and to have flowed from that source as a rational consequence;

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." 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).

KRS 342.316(1)(a) and KRS 316(10) place liability for the payment of compensation for occupational disease on the employer in whose employment the claimant was last exposed to the hazard of the occupational disease. In cases of multiple employers, the Courts have clearly explained the exposure incurred during a particular employment need not have been the actual cause of the disease in order for a causal connection to be established. All that is needed is the claimant present evidence proving "the type of exposure received during the subject employment would have eventually

resulted in contraction of the disease, in other words, that it was injurious." *See* KRS 342.0011(4); Howell v. Shelcha Coal Company, Ky. App., 834 S.W.2d 693 (1992); Childers v. Hackney's Creek Coal Co., Ky., 337 S.W.2d 680 (1960)." Begley v. Mountain Top Inc., 968 S.W.2d 91, 95 (Ky. 1998).

In Princess Manufacturing Company v. Jarrell, 465 S.W.2d 45, 48 (Ky. 1971), the Court held the claimant could prove he or she was suffering from an occupational disease by showing a direct causal relationship between work conditions and a particular disease contracted by one person (as opposed to all employees). The rarity of a contracting a particular disease, in this case bladder cancer, as compared to other workers does not automatically bar his claim if the disease can be shown to be work-related. Certain-Teed Products Corp. v. Mitchell, 574 S.W.2d 910, 913 (Ky. App. 1978).

In this instance, the ALJ relied upon Miller's testimony and the opinion of Dr. Rinehart in determining "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." Dr. Rinehart's opinion and Miller's testimony constitute substantial evidence that he was exposed to MOCA during his employment with MOCA, and to

find a “causal connection between the conditions under which the work is performed and the occupational disease.” KRS 342.0011(3).

It is clear from Miller’s testimony he believed he was exposed to MOCA on a daily basis while performing his duties as a purchasing agent in the production area of the plant. In addition, the medical opinions of Drs. Rinehart and Burke were introduced by Miller. Dr. Rinehart was one of Miller’s treating oncologists. In the treatment notes, Dr. Rinehart noted Miller “used to work in a chemical factory with documented MOCA exposure. He has a history of 2-pack per day smoking for 15 years. However, he quit smoking 30 years ago.” He also noted no documented malignancy in Miller’s family history except for skin cancer. In a letter dated January 24, 2012, Dr. Rinehart diagnosed Miller with “prostatic urothelial carcinoma, papillary high-grade type, Stage T2c, pN0, M0.” When asked, with a reasonable degree of medical probability, his opinion as to whether Miller’s disease is causally related to his previous work environment, Dr. Rinehart stated as follows: “This patient has a long-term exposure to MOCA. This agent is a carcinogen and has highly toxic effects, and a high probability exists, greater than 50%, that his cancer was induced by this agent.”

Dr. Burke noted Miller "does have a history of chronic exposure to a carcinogenic agent MOCA at his factory, where he was a purchasing agent for [TEMA] with regular exposure to the chemical on the floor of the factory." He also noted his history of diabetes, elevated cholesterol, and back problems. He noted his social history is negative for tobacco and drinking. Dr. Burke diagnosed high-grade prosthetic urothelial carcinoma with metastatic spread and secondary post-surgical abdominal hernia. Regarding causation, Dr. Burke stated, "This chemical was probably responsible for inducing the cancer. Medical oncologist, Dr. John Reinhardt, [sic] answered that there is a high probability, greater than 50% that the cancer was induced by this agent. I agree." He also stated Miller was exposed to MOCA, a known carcinogen. Dr. Burke stated no filter was present to protect the employees, Miller wore his regular clothes through the factory floor, during which he was exposed to this chemical, and there was no regulated area while MOCA was being used. He noted Miller "was exposed to a chemical that was transported in pellet form, but exposed and transferred into the distribution machine. Unfortunately, excess chemical was then placed back into the containers, which was disposed of in the common garbage dumpster for an additional site of exposure unfortunately."

Miller's testimony, in conjunction with the opinions of Drs. Rinehart and Miller, constitutes substantial evidence supporting the ALJ's determination Miller was exposed to MOCA, and the finding of a causal connection between his work conditions and the occupational disease. While we acknowledge evidence exists in the record to support a contrary conclusion, this is not adequate for reversal on appeal. The alleged deficiencies of Dr. Rinehart's opinions cited by TEMA go to the weight of the evidence, and do not serve to render his opinions unsubstantial. We also note TEMA did not take the opportunity to cross-examine either Drs. Rinehart or Burke.

Accordingly, the Amended Opinion and Order on Remand rendered March 20, 2015 by Hon. William J. Rudloff, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

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