**OPINION ENTERED: January 11, 2013**

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 & REMANDING**

* * * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

**ALVEY, Chairman.** TEMA Isenmann, Inc. ("TEMA") seeks review of the opinion and order rendered September 13, 2012, by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), finding Jeff F. Miller ("Miller") permanently totally disabled ("PTD") due to cancer caused by his work, and awarding medical benefits related to the condition. TEMA

also appeals from the order on reconsideration entered October 15, 2012.

On appeal, TEMA argues the ALJ erred by denying a referral of Miller for a university evaluation. TEMA also argues the ALJ's decision is not supported by substantial evidence. Because we believe the ALJ erred by refusing to refer Miller for a university evaluation, we vacate and remand.

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[1], 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, 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.

[1] 4,4' –Methylene bis(2-Chloroanaline[MOCA].

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.

Accordingly, the ALJ's opinion and order entered September 13, 2012, and his order on reconsideration issued October 15, 2012 are hereby **VACATED** and **REMANDED** for the ALJ to conduct proceedings consistent with the views expressed in this opinion.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON IAN M GODFREY
771 CORPRATE DR, STE 905
LEXINGTON, KY 40503

**COUNSEL FOR RESPONDENT:**

HON CHARLES W GORHAM
3151 BEAUMONT CENTRE CL, STE 202
LEXINGTON, KY 40513

**ADMINISTRATIVE LAW JUDGE:**

HON WILLIAM J RUDLOFF
400 EAST MAIN ST, STE 300
BOWLING GREEN, KY 42102