RENDERED: AUGUST 5, 2016; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001544-WC

TEMA ISENMANN, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-12-00400

JEFF MILLER;
HONORABLE WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CLAYTON AND JONES, JUDGES.

CLAYTON, JUDGE: Tema Isenmann, Inc. ("TEMA") petitions for review of a decision of the Workers' Compensation Board ("Board") wherein the Board affirmed the Administrative Law Judge's ("ALJ") decision. In the ALJ's decision, Jeff Miller was awarded permanent total disability ("PTD") and medical benefits,

after the ALJ concluded that his exposure to MOCA[1] during his employment with TEMA caused his bladder cancer. After careful review, we reverse the Board's opinion and vacate the case to the ALJ for proceedings consistent with this decision.

BACKGROUND

Jeff Miller filed an Application for Resolution of Occupational Disease Claim, on March 29, 2012, alleging he contracted a disease arising out of and in the course of his employment. The occupational disease claimed was bladder cancer, which he alleged was caused by his exposure to the chemical compound MOCA at the TEMA plant. MOCA is a curing agent used to manufacture screens. TEMA is an international company that manufactures screens for the aggregate industry. The screen is similar in concept to one that is used to sift for gold in a river or one used to sift through sand.

Miller worked for TEMA for fifteen years (1995 – 2010) as an office worker. He retired in June 2010, and in October 2010 developed problems, which were later revealed to be the result of bladder cancer. Miller underwent surgery and chemotherapy. Although Miller's office was not located in the plant, he claimed that in his position as purchasing manager, he went into the plant every day to check inventory. It was in this capacity that he alleges he was exposed to the chemical MOCA. Miller maintained that MOCA was airborne in the plant.

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

The ALJ, after holding a hearing on August 29, 2012, rendered an opinion on September 13, 2012. The ALJ determined that Miller's bladder cancer was causally related to exposure to the MOCA chemical and awarded PTD benefits and medical benefits.

However, the Commissioner, when he assigned the claim to the ALJ, failed to refer Miller for a medical examination by a university evaluator, which is required by both statute and administrative regulation. Consequently, during the pendency of the action, TEMA made a motion for a university medical evaluation under Kentucky Revised Statutes (KRS) 342.315, which the ALJ denied. Thereafter, TEMA filed two petitions for reconsideration, and the ALJ denied both petitions.

TEMA appealed the ALJ's opinion to the Board arguing that the ALJ's decision was not supported by substantial evidence and that the ALJ erred by refusing to refer Miller for a university medical evaluation. The Board rendered an Opinion on January 11, 2013, vacating and remanding the ALJ's decision. It held that the scheduling of a university evaluation is mandatory in all occupational disease claims. Consequently, the Board ordered on remand that the ALJ order a university evaluation under KRS 342.315 as required by KRS 342.316(3)(b)(4)(b).

On February 15, 2013, the ALJ entered an order referring Miller for university evaluation. But the ALJ entered another order, on February 21, 2013, stating that the Medical Services Section of the Department of Workers' Claims notified him that no medical evaluators were available for this case at either the

University of Kentucky or the University of Louisville and, therefore, a university evaluation was not possible. In the order, the ALJ noted that the Medical Services Department suggested that the parties' attorneys agree on an independent medical evaluator for the medical evaluation, and the ALJ so ordered.

Both TEMA and Miller objected to the opinion of any physician not affiliated with the University of Kentucky or the University of Louisville being afforded presumptive weight under KRS 342.315. Nevertheless, on June 3, 2013, TEMA filed a motion for extension of time to designate competent medical specialists. The motion noted that the ALJ had suggested that each party recommend three specialists from which the ALJ would select one to perform the independent medical examination ("IME"); however, TEMA had been unable to locate any specialists in oncology, cancer diagnosis, and treatment who would be willing to render an opinion in this case. The ALJ denied the motion.

The ALJ then appointed Dr. David Jackson, who was one of Miller's three physician recommendations, to perform the IME. Dr. Jackson is a specialist in physical and rehabilitative medicine but not affiliated with any university. Subsequently, TEMA filed a motion for reconsideration, which the ALJ denied. Next, on March 24, 2014, the ALJ entered an amended opinion, which awarded Miller PTD benefits and medical benefits for bladder cancer. TEMA appealed this order to the Board arguing that no competent evidence supported the ALJ's findings and that the Commissioner must provide a university evaluation.

The Board responded with an opinion on August 29, 2014, and requested that the ALJ put on the record a letter from the Department of Workers' Claims regarding the availability of university evaluators. The Board, citing KRS 342.316(3)(b)(4)(b), explained that when no university evaluator is available to evaluate a patient, the Commissioner shall select a physician for evaluation. It remanded the case to the ALJ and stated that "[i]f no university evaluator can be obtained, the ALJ is to request the Commissioner to designate a physician to conduct the medical evaluation as mandated by KRS 342.315(3)(b)(4)(b)."

Next, the Commissioner prepared an order dated March 18, 2015. In the order, the Commissioner stated that efforts by the Department of Workers' Claims to schedule an examination under KRS 342.315 at the University of Louisville or the University of Kentucky had been unsuccessful. Further, the Commissioner had attempted to identify and engage physicians to satisfy the requirements of KRS 342.316, but the physicians declined. Therefore, the Commissioner concluded that a university evaluation under KRS 342.315 and an independent examination under KRS 342.316 were both unobtainable, and the matter should proceed to conclusion.

On March 20, 2015, the ALJ rendered a second "amended opinion and order on remand." As a result of the Commissioner's March 18, 2015 order, the ALJ determined that the case was ready to be decided and, relying on Miller's testimony and the opinion of his treating physician, Dr. John Rinehart, again awarded Miller PTD benefits and medical benefits for the bladder cancer.

On September 11, 2015, the Board affirmed the ALJ's opinion awarding PTD and medical benefits. The Board stated that the ALJ complied with the directives of the Board and the Commissioner in meeting the requirements of KRS 342.315 and KRS 342.316 and that the decision was supported by substantial evidence in the record. TEMA now appeals this decision.

STANDARD OF REVIEW

The claimant in a workers' compensation proceeding bears the burden of proving each of the essential elements of any cause of action, including causation. KRS 342.0011; *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979). When a claimant is successful in meeting that burden, the issue on appeal is whether substantial evidence of record supports the ALJ's decision. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence is 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).

The Board's review in this matter was limited to determining whether the evidence is sufficient to support the ALJ's findings, or if the evidence compels a different result. *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992). Further, the function of the Court of Appeals is to "correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Id*. at 687–88.

Regarding questions of law, this Court is bound neither by the decisions of an ALJ or the Board regarding proper interpretation of the law or its application to the facts. In either case, the standard of review is *de novo*. *Bowerman v. Black Equipment Company*, 297 S.W.3d 858, 866 (Ky. App. 2009).

ISSUES

On appeal, TEMA argues substantial evidence does not support the ALJ's decision because, according to TEMA, the evidence compels a finding that Miller was not exposed to MOCA during his employment. In addition, TEMA argues the ALJ erred in failing to direct the Commissioner to provide a University evaluation pursuant to statutory and administrative mandates.

ANALYSIS

To determine the efficacy of Miller's claim for workers' compensation benefits, it must be ascertained whether substantial evidence supported the ALJ's findings and whether the Board properly confirmed the ALJ's decision. Two questions must be answered to determine the efficacy of Miller's claim for an occupational disease that is work-related. The first question is whether substantial evidence was provided by him that he was exposed to the chemical MOCA. The second question involves whether the exposure to the chemical caused the cancer. We begin our analysis with the issue of whether substantial evidence was provided that Miller was exposed to the chemical MOCA at his workplace.

To begin our review of the ALJ's finding that Miller was exposed to the chemical MOCA during his employment, and for which the Board acquiesced, we must ascertain whether the ALJ's factual findings were based upon probative evidence. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). We are aware that the determination of the credibility of evidence is solely left in the hands of the ALJ. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). And the presence of conflicting evidence is inadequate to require reversal. *Transportation Cabinet v. Poe*, 69 S.W.3d 60 (Ky. 2001). Nonetheless, substantial evidence must exist to support the findings.

According to the definitions in KRS Chapter 342, Workers' Compensation, an "'[o]ccupational disease' means a disease arising out of and in the course of the employment." KRS 342.0011(2). An occupational disease 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.

KRS 342.0011(3).

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 342.0011(3); *Moore v. Sunstone Energy, Inc.*, 849 S.W.2d 529, 531 (Ky. 1993). In proving the existence of an occupational disease, the claimant must provide substantial evidence either that the employment conditions specifically affected the particular claimant or that the conditions can, to a reasonable medical probability, cause such disease. *Princess Mfg. Co. v. Jarrell*, 465 S.W.2d 45, 48 (Ky. 1971).

As authorized by KRS 342.285, the ALJ is the finder of fact, and a reviewing court must give great deference to the conclusions of the fact-finder if supported by substantial evidence. *Uninsured Employers Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991). As previously noted, "[s]ubstantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer*, 474 S.W.2d at 369.

In the ALJ's March 20, 2015 opinion, which was his second amended opinion and third actual opinion, he noted that a final hearing was held on August 29, 2012. Miller and Timothy Dold, vice-president for TEMA, testified at the hearing. In addition, Miller provided the ALJ with the records of Dr. Baxter Napier, his family physician, and Dr. Rinehart as well as the reports of Drs. Frank Burke (orthopedic surgeon) and Jackson. TEMA provided the ALJ with Miller's deposition, Lee Sullivan's deposition, and Dr. Jackson's deposition; it also offered the reports of Dr. Michael Hallet (urologist), Dr. James Lockey (specialist in

pulmonary medicine), Rick Pounds (FCE[2] report), and Mike Ward (toxicology chemist).

But after describing the evidence provided by both the plaintiff and the defendant, the ALJ cites only Miller, the plaintiff, and Dr. Rinehart, his treating physician, in the following statement:

> 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.

In sum, the ALJ relied solely on the claimant's and his physician's testimony for his conclusion that the bladder cancer was caused by a work-related condition – exposure to the chemical MOCA. Here, the claimant provided no physical evidence of his exposure – urine or blood samples, other lab work, or any other objective testing that could confirm exposure to the MOCA chemical at TEMA. Indeed, the only evidence provided by Miller was his own subjective belief that he was exposed.

Even though the ALJ found Miller to be credible, the only evidence provided by Miller was his own subjective belief that MOCA was airborne and, consequently, he had been exposed to the chemical. Hence, the issue becomes whether Miller's subjective belief is "evidence of substance and relevant

[2] Functional Capacity Evaluation.

consequence having the fitness to induce conviction in the minds of reasonable men." *See Smyzer*, 474 S.W.2d at 369.

Contrasting Miller's subjective belief regarding his exposure to MOCA was the following information: he was an office worker who did not work in production or even near the machine when MOCA was in use; he was not trained in work with MOCA or to use the machine where the MOCA was utilized; his job responsibilities did not include safety management or OSHA compliance; he had no background in chemistry or engineering; and, he never assessed the air samples in the plant.

To counter Miller's assertions, TEMA provided the following testimony and evidence. Sullivan, the plant manager, testified about the "closed system" used to contain MOCA during the production and described that after the production, MOCA was kept separately to keep any MOCA residue from escaping.

In addition, TEMA had safety testing procedures to detect exposure to employees. Each production employee had a urine test quarterly. If an employee tested high, he or she was taken off production for a month and retested until the levels returned to normal. (Office employees were not tested because they were not involved in production.) Sullivan testified that an employee was only relocated two or three times ever. He also provided a Kentucky OSHA study from 2009 that revealed MOCA levels well below Kentucky OSHA standards. And Sullivan testified that he knew of no TEMA employee besides Miller who had ever been diagnosed with bladder cancer.

Nor did the ALJ remark in his opinion about the testimony of Dold at the hearing. Dold averred that the company had never been cited by OSHA regarding its use of MOCA and had never had to cease production. Further, TEMA's expert, Ward, a toxicological chemist, who examined Sullivan's deposition, as well as documents and diagrams regarding the MOCA machine at TEMA, confirmed that the system used would have prevented MOCA from being released. Further, he advised that it would have been extremely unlikely that Miller was exposed to MOCA at all or to levels significant enough to cause cancer. Ward instructed that, in his opinion, the exposure to MOCA by TEMA employees was negligible. While he acknowledged that MOCA is considered a potential carcinogen, he stated that there are no established levels of MOCA attributable to causing cancer. In fact, Ward stated that no studies show adequate evidence of an association of MOCA with cancer.

Additionally, both Sullivan and Ward observed that Kentucky is one of three states to have higher safety standards for MOCA than the other forty-seven states or the federal government. In fact, the ALJ himself admitted that he could not find any clear and convincing evidence that TEMA intentionally failed to comply with any specific statute or regulation that might have caused or brought about Miller's occupational disease.

The ALJ's determination that TEMA did not intentionally fail to comply with any specific statute or regulation that might have caused or brought about Miller's occupational disease renders unpersuasive Miller's suggestion in his

brief that, based on Dr. Burke's medical report, TEMA violated Kentucky Administrative Regulations 803 (KAR) 2:320, which applies to the handling of toxic and hazardous substances. Dr. Burke merely recited the information given to him by Miller about TEMA when he remarked that certain protocols regarding the chemical had not been followed. However, he had no independent source of information that TEMA had not met its safety requirements regarding MOCA; the company was not charged with any violation; and, the ALJ corroborated that no intentional violations had occurred.

Next, we consider the medical evidence in the case. The ALJ relied, in particular, on Miller's treating physician, Dr. Rinehart, for his conclusion that Miller was exposed to MOCA and that this exposure caused his bladder cancer. Significantly, Dr. Rinehart himself relied solely on Miller's statements that he was exposed to MOCA. The doctor neither had nor provided any independent information that Miller had been exposed to MOCA. Since Miller's alleged exposure to MOCA is a factual question rather than a medical one, it is troublesome that the ALJ used only Dr. Rinehart's testimony to support his findings that Miller's bladder cancer was caused by exposure to the MOCA chemical.

To support his claim, Miller also provided the ALJ with the records of Drs. Baxter Napier and Rinehart as well as the reports of Drs. Frank Burke (orthopedic surgeon) and Jackson. Dr. Napier treated Miller from October 2010 through October 2011. Dr. Napier treated Miller after his surgery with

chemotherapy for bladder cancer; successful cardioversion of atrial fibrillation; type 2 diabetes; and, ongoing fatigue. His records do not address causation.

The treatment records from University of Kentucky Healthcare, Division of Medical Oncology from April 13, 2011, through September 2011 discussed Miller's history of bladder cancer and subsequent treatment. Miller was diagnosed with bladder cancer and had a total cystectomy in January 2011. The doctors then recommended that Miller undergo adjuvant chemotherapy. He subsequently underwent four courses of chemotherapy from June 2011 through September 2011. The records observed that Miller had worked in a chemical factory with documented MOCA exposure, that he had a history of two-pack per day smoking for fifteen years but had quit smoking thirty years ago. The records stated that Miller's family had no documented cancer other than skin cancer.

Dr. Rinehart, Miller's oncologist, prepared a letter dated January 24, 2012, wherein he diagnosed Miller with bladder cancer. He stated that in his opinion, with a reasonable degree of medical probability, Miller's disease was causally related to his previous work and that Miller had long-term exposure to MOCA. Dr. Rinehart opined that 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.

Miller also introduced the July 12, 2012 IME of Dr. Burke. Dr. Burke provided the following past medical history: The patient has no history of previous bladder problems. Based on Miller's assertions, Dr. Burke observed that 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 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. Regarding causation, Dr. Burke agreed with Dr. Rinehart that there is a high probability, greater than 50%, that the cancer was induced by this agent.

Miller also supplied the August 6, 2013 report of Dr. Jackson, who also testified by deposition on December 17, 2013. Following examination, Dr. Jackson diagnosed Miller with metastatic bladder cancer and 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 introduced reports from Drs. Lockey and Hallet, plus a FCE of Miller by Rick Pounds, a specialist in rehabilitation. Dr. Lockey stated in his report based on the information currently available, it was his opinion that Miller's bladder cancer was related to his previous history of cigarette smoking and

diabetes. He opined that no objective evidence was provided that Miller was exposed to a level of MOCA that would have put him at risk for bladder cancer. Dr. Hallet also was of the opinion that Miller's bladder cancer was not caused by exposure to MOCA. Further, he reported that most epidemiological studies concerning the carcinogenic effects of MOCA were animal studies. The studies conducted on humans concluded that insufficient evidence existed to ascertain whether MOCA has a major carcinogenic effect on humans.

In addition, TEMA filed the FCE performed by Pounds on August 14, 2012. Pounds explained that a purchasing manager is classified as a sedentary physical demand level by the United States Department of Labor. After testing Miller, Pounds determined that Miller could perform all maximum sedentary and light level Department of Labor requirements.

Thus, in evaluating the ALJ's findings, it is clear that he depended exclusively on Miller's and Dr. Rinehart's testimony to make his finding that Miller had been exposed to MOCA and that it caused his bladder cancer. Although we are cognizant of the ALJ's authority to weigh the evidence and make findings, it is still our responsibility to ascertain whether substantial evidence was provided by a claimant to prove each essential element of any cause of action, including causation. Here, we question whether Miller proved that this chemical was airborne in significant quantities to cause his bladder cancer, particularly in light of the admonition that substantial evidence must be robust enough to induce conviction in the minds of reasonable persons.

But even more troubling is the fact that KRS 342.316(3)(b)(4)(b) requires a university evaluation to be performed at a facility selected by the Commissioner in all occupational disability claims. A portion of the statute specifically outlines the medical procedures necessary for establishing pneumoconiosis, but the statute is also applicable to other occupational diseases, as is the case here. *See* KRS 342.316(3)(b)(4)(c). To provide a university medical evaluation, KRS 342.315(1) directs the 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." The purpose of KRS 342.315 is to obtain opinions from an "unbiased medical expert" and to ensure such experts would be available. *Morrison v. Home Depot*, 197 S.W.3d 531, 534 (Ky. 2006). Therefore, under KRS 342.315, a university evaluation is mandated as delineated in KRS 342.316(3)(b)(4)(b). As noted by the Board in its opinion entered on January 11, 2013, "we believe the scheduling of an evaluation in all occupational disease claims is mandatory."

Additionally, 803 KAR 25:010 provides the following guidance:

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

803 KAR 25:010 §11(1).

Thus, as authorized by KRS 342.315(1), a university evaluation must take place at either the University of Kentucky or the University of Louisville. Further, the evaluating physician must be affiliated with either institution under KRS 342.315(2). Accordingly, a physician not affiliated with either university cannot be substituted as a university evaluator. In *Morrison*, a case that also required a university medical evaluation, the University of Louisville contracted with a physician who was not affiliated with either university for an evaluation. *Morrison*, 197 S.W.3d at 531. The Kentucky Supreme Court held that under KRS 342.315, a medical evaluation performed by a physician who was not employed by the university medical school, was not admissible as a medical evaluation. *Id*. at 534-35.

Moreover, KRS 342.315(2) states that when a university evaluation occurs, the findings and opinions of the evaluator "shall be afforded presumptive weight by [the ALJ] and the burden to overcome such findings and opinions shall fall on the opponent of that evidence." In the case at hand, no unbiased, qualified medical evaluator provided findings and opinions.

The rationale for KRS 342.315 was clarified in *Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. 2000). Therein, it was noted that the purpose of KRS 342.315 is to provide ALJs with clinical findings and opinions from unbiased medical experts and to assure sufficient numbers of such experts. *Id.* at 95. In the case at bar, Dr. Rinehart, Miller's treating physician, cannot serve as an unbiased medical expert since he is Miller's treating physician. Keep in mind that this

requirement is only for occupational disease claims and is not applicable to injury claims. *Id*. at 91.

Moreover, KRS 342.315(3) provides that the responsibility for appointing a university evaluator lies with the Commissioner. Therefore, it is the Commissioner's responsibility to determine how to appoint an unbiased medical evaluator. Here, when the Commissioner could not find an unbiased evaluator, he apparently suggested that the ALJ recommend the attorneys agree on an independent medical evaluator. Initially, both parties objected to that process. The ALJ asked the parties to designate three physicians specializing in oncology in order for him to select a person to perform the evaluation. Both parties struggled to discover three physicians with the required expertise willing to perform the evaluation. Miller submitted the names of three physicians who customarily perform IME for workers' compensation plaintiffs but who were not certified in oncology or urology. TEMA asked for an extension in time because it was having difficulty locating experts. The motion was denied by the ALJ. And over TEMA's objection, the ALJ chose Dr. David Jackson, a specialist in physical and rehabilitative medicine to perform the IME.

Clearly, Dr. Jackson's IME cannot be considered a university evaluation under KRS 342.315. He is not affiliated with either university, and his background is not in oncology or urology. Dr. Jackson admitted in his deposition that he has little knowledge of the causes of bladder cancer and is unaware of the

most common causes. Hence, his opinion could not have been granted presumptive weight.

The case at bar presents a situation not contemplated by the statutes, but our role in construing a legislative act is to effectuate the intent of the legislature. *Magic Coal Co.*, 19 S.W.3d at 94. Prior to December 12, 1996, KRS 342.315 permitted an ALJ, upon motion of either party or on the ALJ's own motion, to appoint up to three "disinterested and duly qualified physicians or surgeons" to examine an injured worker and to testify by means of a joint report. In addition, the previous version of KRS 342.315 contained no standard or procedure for assuring a supply of "disinterested and duly qualified physicians or surgeons." Since this procedure was eliminated by the1996 amendments to the statutes, it cannot be considered as a viable alternative.

But taken together, the 1996 amendments to KRS 342.315 and KRS 342.316 provide for contracts with the University of Kentucky and University of Louisville medical schools for medical examinations. They require a university evaluation in all occupational disease claims and provide that the "clinical findings and opinions" of the university evaluator "shall be afforded presumptive weight." Together, KRS 342.315 and KRS 342.316 assure that testimony from a disinterested medical expert will be considered by the fact-finder in all occupational disease claims.

Thus, because of the statutory mandate, we hold that it is incumbent upon the Commissioner to seek independent medical evaluators for all

occupational disease claims. The reasons are clear – unbiased and qualified experts to provide presumptive evidence in cases that are replete with contradictory or insufficient evidence as in this case. In such matters, it is not the responsibility of the ALJ but of the Commissioner. Therefore, because the issue in the case at bar is a legal one, which we review *de novo*, we vacate the opinion of the Board. The statutory mandate requires a university medical evaluator in occupational disease cases. Further, the responsibility for finding such an expert rests with the Commissioner. Nothing in the statute permits an avoidance of the legislative mandate.

CONCLUSION

The decision of the Workers' Compensation Board is vacated and remanded to the ALJ for a new order requiring the Commissioner to procure a university medical evaluation or, if that is impossible, find an independent and qualified medical expert either by recommendation of the University of Louisville or the University of Kentucky or by independent search for a qualified university medical evaluator from outside these universities. After such an evaluation has been performed, the ALJ shall determine whether substantial evidence has been provided that Miller has an occupational disease entitling him to PTD and medical benefits.

ACREE, JUDGE, CONCURS.

JONES, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Carl M. Brashear
Lexington, Kentucky

BRIEF FOR APPELLEE:

Charles W. Gorham
Lexington, Kentucky