

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002054-WC

WENDELL R. RUSSELL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-91216

SMALL TRUCKING CO., a/k/a STC, INC.
A Subsidiary of WEST KENTUCKY PROPANE,
now known as UNITED PROPANE GAS CO.;
GENERAL ACCIDENT INSURANCE CO.;
DONALD G. SMITH,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: HUDDLESTON, JOHNSON and KNOPF, Judges.

HUDDLESTON, Judge: Wendell Russell appeals from a Workers' Compensation Board opinion affirming the Administrative Law Judge's award of benefits to Russell for a permanent partial disability based upon an 8% impairment rating. The issues presented are: (1) whether Kentucky Revised Statute (KRS) 342.315 is unconstitutional because it violates the doctrine of separation of powers; (2) if KRS 342.315 is constitutional, whether the ALJ misinterpreted the

intent of the statute by giving an irrebuttable presumption to the evaluation of a physician at a state medical school; and (3) whether the ALJ erred in failing to submit a copy of the treating physician's report to the university evaluator.

I. FACTS AND PROCEDURAL HISTORY

The facts in this case are not disputed. Russell, a forty-four year old male with an eighth-grade education, was employed by Small Trucking Company. Russell's job primarily involved hauling propane but also included carpentry and construction work. In February 1997, Russell slipped and fell, injuring his left arm while working in Mt. Vernon, Indiana. Russell attempted to return to work but was unable to use his hand. He sought medical treatment from his family physician, who referred him to Dr. David G. Yingling, a neurosurgeon. Dr. Yingling operated on Russell's arm. Russell subsequently underwent physical therapy and work hardening. In August 1997, Russell returned to work with Small Trucking, where he worked until November 1998, when he found other employment.

According to Russell, he still experiences numbness in the little and ring fingers of his left hand. He also suffers from arm cramps when he drives. Russell has experienced a diminished ability to grip with his left hand.

Dr. Yingling diagnosed Russell as having a left ulnar neuropathy. Following ulnar decompression surgery, Dr. Yingling prescribed physical therapy for Russell. Based on his evaluation, Dr. Yingling assigned a 17% impairment under the American Medical

Association's (AMA) Guide to the Evaluation of Permanent Impairment.

Dr. Christopher Sneed, a neurosurgeon, examined Russell over one year after the accident. Dr. Sneed diagnosed Russell's injury as ulnar neuropathy and assigned an 8% impairment to the injury based on the AMA Guide.

Small Trucking made a request to the ALJ for a medical evaluation pursuant to KRS 342.315, and the ALJ ordered the evaluation. In his order, the ALJ stated that all medical reports in the record as of October 30, 1998, would be forwarded to the designated evaluator. In addition, the ALJ stated that if any party wanted additional diagnostic test results or interpretations to be considered by the evaluator, the documents were to be submitted to the ALJ by November 9, 1998. While the deposition of Dr. Yingling was taken on November 3, no party requested that the ALJ forward a transcript of the deposition to the evaluator.

Dr. Gregory Gleis, an orthopedic surgeon, who served as the evaluator, examined Russell on December 17. Dr. Gleis diagnosed Russell's injury as a left ulnar nerve contusion at the elbow. Based on this determination, Dr. Gleis assessed an 8% impairment rating under the AMA Guide. Dr. Gleis recommended that Russell avoid all vibratory work involving his left hand, but opined that he should be able to return to his previous work.

After reviewing the evidence, the ALJ concluded that Russell could return to his previous work. In determining Russell's impairment rating, the ALJ declared that Russell had failed to overcome the rebuttable presumption given to Dr. Gleis's

evaluation. Therefore, the ALJ awarded Russell benefits based on an 8% impairment rating.

Russell appealed to the Workers' Compensation Board pursuant to KRS 342.285. After reviewing the ALJ's decision, the Board affirmed the award. The Board found that the ALJ's interpretation of KRS 342.315 - that Russell had to overcome a presumption that Dr. Gleis's evaluation was valid - was consistent with the language of the statute. The Board also concluded that the ALJ did not err in failing to forward a copy of Dr. Yingling's deposition to Dr. Gleis because the ALJ had no obligation to do so. This appeal followed.

II. CONSTITUTIONALITY OF KRS 342.315

Russell first argues that KRS 342.315 is unconstitutional because it violates the separation of powers mandated by the Kentucky Constitution.

There is "strong presumption in favor of constitutionality and [we] should hold so if possible."¹ The Workers' Compensation Act, KRS 342.001-.990, provides a statutory cause of action. As part of the Act, the General Assembly enacted KRS 342.315 directing the Commissioner of the Department of Workers' Claims to contract with the University of Kentucky and the University of Louisville medical schools for evaluations of claimants under the Act.² KRS 342.315(3) provides, in part, that:

¹ Brooks v. Island Creek Coal Co., Ky. App., 678 S.W.2d 791, 792 (1984) (citing United Dry Forces v. Lewis, Ky., 619 S.W.2d 489 (1981); Sims v. Board of Educ. of Jefferson County, Ky., 290 S.W.2d 491 (1956)).

² KRS 342.315(1).

The commissioner, an arbitrator, or an administrative law judge may, upon the application of any party or upon his own motion, direct appointment by the commissioner, pursuant to subsection (1) of this section, of a medical evaluator to make any necessary medical examination of the employee. Such medical evaluator shall file with the commissioner within fifteen (15) days after such examination a written report.

While the ALJ has discretion in deciding whether to seek an evaluation, an evaluator at either of the state medical schools must conduct the evaluation.

When an evaluator at one of the medical schools conducts an evaluation:

The clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by arbitrators and administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. When arbitrators or administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.³

Russell argues that KRS 342.315 is unconstitutional because of the presumption that ALJs must afford the reports from university evaluators.

³ KRS 342.315(2).

As the Act is structured, workers' compensation claims are considered in administrative proceedings. The judiciary becomes involved only after a party takes an appeal from the Workers' Compensation Board to the Court of Appeals.⁴ Because workers' compensation claims are a creature of statute, it is within the purview of the General Assembly to create presumptions for considering evidence. This statutory scheme clearly does not violate the separation of powers by invading the province of the judiciary. Kentucky's highest court in Commonwealth v. Kroger⁵ noted that it is within the power of the General Assembly to create presumptions for statutory causes of action. Thus, we find that KRS 342.315 is constitutional.

III. ALJ'S INTERPRETATION OF KRS 342.315

Russell also avers that the ALJ erred in interpreting KRS 342.315. In particular, Russell claims that the ALJ used an irrebuttable presumption that Dr. Gleis's evaluation was correct. However, the ALJ's order specifically refutes this argument:

Dr. Gleis is to be afforded presumptive weight under KRS 342.315; therefore, [Russell] is found to have an 8% impairment rating. Although Dr. Yingling is [Russell]'s treating physician, that alone is not enough to overcome the presumption in KRS 342.315. There must be direct testimony contradicting the university evaluator or flaws in the university report indicated by other medical evidence.

⁴ See KRS 342.290. See also Ky. Const. § 111(2).

⁵ 276 Ky. 20, 122 S.W.2d 1006 (1938).

KRS 342.315 clearly states the evaluation of the university evaluator is to be assigned a presumption of validity. However, the statute does not use the word "irrebuttable" nor can its meaning be reasonably construed to mean that.

Here, the ALJ did not apply an irrebuttable presumption. Instead, the ALJ considered the evaluations of Dr. Yingling and Dr. Sneed, and found that their testimony did not refute Dr. Gleis's evaluation. It is the responsibility of the fact-finder to consider the reports and evaluate the credibility of the physicians.⁶ Like Dr. Glies, Dr. Sneed evaluated Russell over one year after the accident. Dr. Yingling's evaluation was done almost immediately after the accident. In considering the current state of Russell's injury, the ALJ found that Dr. Yingling's testimony did not refute Dr. Gleis's conclusion. The ALJ did not err in so finding.

IV. ALJ'S FAILURE TO FORWARD A TRANSCRIPT
OF DR. YINGLING'S DEPOSITION

Finally, Russell argues that the ALJ erred when he failed to forward a copy of Dr. Yingling's deposition to Dr. Gleis.

On October 30, 1998, the ALJ signed an order notifying the parties that Russell was to be evaluated pursuant to KRS 342.315. The ALJ also stated that certain documents in the record would be forwarded to the evaluator. If any of the parties wanted

⁶ See Gallatin County Bd. of Educ. v. Mann, Ky. App., 971 S.W.2d 295 (1998) ("In its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact.") (citing Kentucky State Racing Comm'n v. Fuller, Ky., 481 S.W.2d 298, 308 (1972)).

the evaluator to consider any additional diagnostic test results or interpretations, the ALJ ordered them to submit that information to the ALJ within ten days of the order.

On November 3, 1998, Russell took the deposition of Dr. Yingling. Russell did not file a transcript of the deposition with the Department of Workers' Claims until November 23, 1998. The filing fell outside the time frame for submitting additional information fixed in the ALJ's October 30, 1998, order. The ALJ is allowed to conduct proceedings with some discretion as long as due process is afforded all parties.⁷ The ALJ's decision to impose a deadline for submitting documents to be considered by the evaluator was reasonable. Because Russell was tardy in submitting the deposition of Dr. Yingling, the ALJ had no responsibility to forward the transcript to the evaluator. We find no error.

IV. CONCLUSION

We affirm the Workers' Compensation Board's opinion awarding Russell a permanent partial disability based upon an 8% impairment rating.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rodger W. Lofton
Paducah, Kentucky

BRIEF FOR APPELLEES:

Richard A. Vitale
O'BRYAN, BROWN & TONER
Louisville, Kentucky

⁷ See Kaelin v. City of Louisville, Ky., 643 S.W.2d 590 (1983) (discussing Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970)).