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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1999-CA-002578-WC

ROBERT L. WHITTAKER,
DIRECTOR OF SPECIAL FUND — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-91-37774

TERRY NOEL;
JOSEPH E. SEAGRAM & SONS;
HONORABLE IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

AND: NO. 1999-CA-002682-WC

JOSEPH E. SEAGRAM & SONS — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-91-37774

TERRY NOEL;
HONORABLE IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING
** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI AND HUDDLESTON, JUDGES.

GUIDUGLI, JUDGE. In these consolidated appeals, Joseph E. Seagram and Sons (Seagram) and Robert L. Whittaker, Director of the Special Fund (the Special Fund), appeal from an opinion of the Workers' Compensation Board (the Board) entered October 1, 1999, which reversed and remanded an opinion and award of the Administrative Law Judge (the ALJ) entered July 24, 1998, which granted benefits to Terry Noel (Noel). We reverse.

Noel was employed by Seagram as a warehouseman and filler. His position required him to maneuver 500 pound barrels of whiskey. Noel sustained work-related injuries to his back on two separate occasions, one occurring on September 10, 1991, the other on June 29, 1992. As it appears that the medical evidence in this case is not in dispute, we adopt the following portion of the ALJ's opinion and award as our own:

> [Following the 1991 injury, Noel] saw Dr. Hagan and was placed on physical therapy. At that time Plaintiff had complained of pain in his low back and right leg and, in addition to seeing Dr. Hagan, he was also treated by Dr. Sewell and Dr. Browne. He eventually returned to work in 1991, to the same job, without restrictions, although he stated that he continued to experience some back problems.
>
> Plaintiff worked until June 29, 1992, when he again was lifting some barrels and re-experienced severe low back pain. Plaintiff returned to Dr. Hagan's care but was eventually transferred to Drs. Guarnaschelli and Petruska. He continued to complain of the same type of symptoms with pain in his low back and right leg, as he had at the time of the previous injury. The record indicates that he was under the care of Dr. Petruska for both physical therapy, a diskogram, and a

pain management evaluation, however, no surgical intervention has been performed.

. . . .

Plaintiff's treating physician, Dr. Petruska, has followed him since September 10, 1992, subsequent to the second injury herein. Dr. Petruska's records reflect that Plaintiff has suffered from low back and right leg pain, with occasional numbness into the right foot; that motion range was limited; straight leg raising was positive on the right; and a review of an MRI scan revealed Plaintiff to have a soft disc herniation on the right at the L5-S1 level. During this time frame, it appears that Dr. Petruska did not feel that Plaintiff's problems were surgically correctable. Dr. Petruska's notes indicate that Plaintiff has been hospitalized for severe pain in the past; and he also performed a cervical fusion which, again was not a work-related situation. His records indicate that Plaintiff continues to be treated at this time, and he felt that Plaintiff overall had an 8% impairment rating; that he should not lift in excess of 10 pounds; he was restricted regarding bending, squatting, crawling, and climbing; and could only sit, stand, and walk for 1 hour out of an 8-hour day.

Plaintiff also introduced evidence from Dr. Williamson, the pain management medical doctor, where Plaintiff underwent a program in July and August, 1994. Dr. Williamson noted Plaintiff to be suffering from degenerative changes from the L2 thru L5 levels, with a right radiculopathy, and complaints of parathesia. He noted severe motion limitation, and straight leg raising was positive at approximately 25 degrees on the left and zero on the right. He felt that Plaintiff should not lift in excess of 10 pounds and that he could not bend, squat, crawl, climb, or stoop.

. . . .

Plaintiff was evaluated in 1993 by Dr. Auerbach at the request of the Defendant insurance carrier, and he also reviewed the functional capacity evaluation which the insurance carrier requested as well. As of

1993, Dr. Auerbach had assessed a 22% impairment rating under the Third Edition of the AMA Guidelines.

The Defendant/Employer introduced evidence from Dr. Goldman, who performed an independent medical evaluation on Plaintiff and assessed a 10% impairment rating apportioned 50/50, with lifting limitations of 25 to 30 pounds. He also imposed restrictions against excessive walking and standing, and Plaintiff should avoid bending forward with the knees straight. It was Dr. Goldman's opinion that Plaintiff was unable to return to his previous employment performing heavy manual labor at the distillery. He did note that Plaintiff was exhibiting excessive pain behavior. It was his opinion that Plaintiff would be capable of returning to gainful employment within these restrictions.

The final medical evidence came from Dr. Gleis pursuant to an evaluation requested by the ALJ [pursuant to KRS 342.315(3)]. This evaluation took place on March 3, 1998. Plaintiff had complained of back pain, going from his back into the right leg. Dr. Gleis reviewed various diagnostic testings, including a lumbar myelogram, an MRI, and a diskogram, and it was his opinion that Plaintiff had a chronic lumbosacral strain without radiculopathy; that his complaints of sciatic pain were secondary to the strain; that there were indications of symptom magnification while performing Waddell testings which was confirmed by the diskogram results; and that the lumbar range of motion using the Dual Inclinometry indicated a nonvalid effort on this test. He felt that Plaintiff warranted an overall 5% impairment rating, half of which was attributed to arousal of degenerative changes, and that Plaintiff was restricting himself excessively. It was his opinion that Plaintiff could lift between 20 and 40 pounds.

In awarding benefits to Noel, the ALJ stated:

Based upon the record herein and in first dealing with whether or not the Plaintiff should have submitted to a university evaluation, it is the opinion of this ALJ

> that pursuant to the amendments set forth in December, 1996 which provides for these university evaluations, this process is procedural in nature and under these circumstances would, therefore, be remedial. Furthermore, I have noted that the medical evidence in this record is extremely stale for the most part, and that there was a great discrepancy in the impairment ratings. Additionally, the order which directed Plaintiff to undergo the university evaluation was issued by the undersigned ALJ on January 5, 1998 and a new Pre-Hearing Conference was originally scheduled for March 18, 1998 but did not, in fact, take place until June 10, 1998 which is also the time the Hearing took place, and it is my opinion that Plaintiff's counsel had adequate time to request a cross-examination of Dr. Gleis, had he so desired. This, however, is an "old law case" and the principles of Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968) still apply. It appears that Plaintiff does suffer from degenerative changes in the lumbar spine, but there is no outright diagnosis of disc herniations. [KRS 342.315(2)] mandates that the university evaluator's report be given presumptive weight and, taking into consideration the reports filed by Plaintiff, I do not find any basis on which to deny this presumptive weight. The report filed by Dr. Petruska is not sufficient to overcome this presumption. I do, however, recognize that Plaintiff has only performed heavy manual labor in the past, although he does have a high school education. Based upon the lifting limitations also set forth by Dr. Gleis which limits Plaintiff to light to medium work, as well as his impairment rating, I find that Plaintiff has sustained an occupational disability of 40%, one-half of which shall be paid by the Special Fund as per previous stipulations.

On appeal to the Board, Noel argued that the ALJ erred in affording presumptive weight to the opinion of Dr. Gleis pursuant to KRS 342.315(2). Based on this Court's decision in Magic Coal Company v. Fox, 1998-CA-000527-WC, the Board agreed

and reversed and remanded the case to the ALJ for further consideration. This appeal followed.

Both Seagram and the Special Fund contend that the Board erred in finding that the presumptive weight provision of KRS 342.315(2) do not apply to pending claims. They argue that the statutory presumption given to the opinion of a university evaluator pursuant to KRS 342.315(2), as amended effective December 12, 1996, is procedural in nature and thus applicable to all claims regardless of the fact that the injury occurred prior to the effective date of the amendment. During the pendency of these appeals, our decision in Magic Coal was under review by the Kentucky Supreme Court. On May 18, 2000, the Kentucky Supreme Court rendered its decision in Magic Coal and held as follows:

> [T]he amendments to KRS 342.315 which became effective on December 12, 1996, apply to all claims pending before the fact-finder on or after that date. KRS 342.315(2) creates a rebuttable presumption which is governed by KRE 301 and, therefore, does not shift the burden of persuasion. Pursuant to KRS 342.315(2), the clinical findings and opinions of the university evaluator constitute substantial evidence of the worker's medical condition which may not be disregarded by the fact-finder unless it is rebutted. Where the clinical findings and opinions of the university evaluator are rebutted, KRS 342.315(2) does not restrict the authority of the fact-finder to weigh the conflicting medical evidence. In instances where a fact finder chooses to disregard the testimony of the university evaluator, a reasonable basis for doing so must be specifically stated.

Magic Coal Company v. Fox, Ky., ____ S.W.3d ____, ____ (2000).

Based on the foregoing, the opinion of the Workers' Compensation Board is reversed, and the opinion and award of the ALJ entered July 24, 1998, is reinstated.

ALL CONCUR.

BRIEF FOR APPELLANT, SPECIAL FUND:

John W. Burrell
Frankfort, KY

BRIEF FOR APPELLANT/APPELLEE, SEAGRAM & SONS:

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BRIEF FOR APPELLEE, NOEL:

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