# IMPORTANT NOTICE
# NOT TO BE PUBLISHED OPINION

**THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

RENDERED: OCTOBER 29, 2009
NOT TO BE PUBLISHED

# Supreme Court of Kentucky



2009-SC-000061-WC

JAMES KELLY — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2008-CA-000075-WC
WORKERS' COMPENSATION BOARD NO. 05-92344

RADAC CORP.; HONORABLE A. THOMAS DAVIS, II, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

This appeal is taken from a Court of Appeals decision to reaffirm the claimant's partial disability award. The claimant argues that the Administrative Law Judge (ALJ) erred by failing to afford presumptive weight to the opinions of two university evaluators and by failing to analyze the evidence under McNutt Construction/First General Services v. Scott[1] when finding his injury to be only partially disabling. We affirm for the reasons stated herein.

The claimant was born in 1957 and quit school during his freshman year. He worked as a laborer in the defendant-employer's plant, manufacturing radiators. His application for benefits alleged that he injured

[1] 40 S.W.3d 854 (Ky. 2001).

his back while working on March 4, 2005. He testified subsequently that he was removing a radiator core from a dip pot when he felt a sudden onset of pain, after which his left leg became numb and gave way. He stated that he began to experience bowel incontinence about one to two months later. When asked why Dr. Duplechan's records indicated that he denied experiencing incontinence on April 26, 2005, he replied that physicians "kept asking me about it, and I thought they was talking about, you know, having to bend over and wipe myself. I didn't know what they really meant." He could not explain why he failed to tell his treating physicians about his bowel difficulties until October 2005.

The claimant acknowledged that he experienced a previous back injury in 2002. He stated that it affected the right side and that he did not experience pain on the left side until after the March 2005 injury. He also stated that Dr. Bailey had recommended surgery but that he had decided against it due to potential complications. His other pre-existing health problems included sleep apnea, diabetes, depression, and anxiety. He had not worked since March 2005 and awaited a hearing on the denial of his social security disability claim.

Dr. Bailey, the claimant's treating orthopedic surgeon, diagnosed a herniated disc at L5-S1 on the left. He assigned a 10% permanent impairment rating, of which he attributed a 5% rating to the 2005 injury.

Dr. Autry, a board-certified orthopedic surgeon, evaluated the claimant for the employer in July 2006. In his opinion, the 2005 accident exacerbated or extended a pre-existing disc herniation at L5-S1. He noted that the claimant

experienced lumbar radiculopathy on the right side after the 2002 injury but on the left side after the 2005 injury. Thus, the need for ongoing medical treatment related to the 2005 injury. He noted that the claimant reported a recent onset of fecal incontinence.

When deposed, Dr. Autry stated that he thought it impossible to be certain whether the incontinence was directly related to the 2005 injury and recommended additional diagnostic testing, including EMG. Questioned in December 2006 about the likelihood that the back condition caused bowel incontinence, he responded that he thought it unlikely unless the claimant had concurrent bladder incontinence. He also indicated that he considered a neurosurgical evaluation to be appropriate but that a gastroenterologist would be a more appropriate specialist to evaluate bowel issues because factors other than the injury might have caused the incontinence.

Dr. Autry assigned a 10% permanent impairment rating, half of which he attributed to the 2005 injury. He stated that without the surgery Dr. Bailey recommended, the claimant should avoid lifting more than 20 pounds a few times per hour or more than 10 pounds more than 15-20 times per hour; sitting or standing more than one hour at a time; and bending, lifting, or stooping. He might also require periodic pain medication. With the surgery, his lifting restriction would be 30 pounds and his ability to sit and stand would also improve.

The claimant requested a university evaluation to determine his permanent impairment rating and whether the injury caused his bowel

incontinence, after which the ALJ entered two orders. An October 23, 2006, order sustained the claimant's motion but limited the evaluation to "(1) Whether the Plaintiff has bowel incontinence; and (2) The cause of such a condition, if it exists, whether it is related to the Plaintiff's work injury of March 4, 2005." An order of October 24, 2006, referred the claimant for a university medical evaluation to address "Whether the Plaintiff has bowel incontinence, the cause of such a condition, if it exists[,] and whether it is related to the Plaintiff's work injury of March 4. 2005." The order requested "[a]ll information required by the Form 107 medical report, including causation, diagnosis, impairment rating . . . and restrictions" and reiterated the scope of the requested examination.

Dr. Harpring, a board-certified neurosurgeon, performed the university evaluation in December 2006. He assigned a 13% impairment rating to the herniated lumbar disc and attributed it entirely to the work-related injury, noting that the claimant "was asymptomatic for a long time before the alleged accident." He assigned restrictions similar to those Dr. Autry assigned and stated that the claimant lacked the physical capacity to return to his previous work. He noted in an addendum that the claimant did not have true urinary incontinence and that the films did not reveal a very large central herniated disc causing severe stenosis, both of which would be expected if a herniated disc caused the bowel incontinence. Dr. Harpring concluded by recommending a urology or proctology evaluation regarding the complaints.

The ALJ granted the claimant's request for a university evaluation by Dr. Tuckson on February 7, 2007. Dr. Tuckson, a colorectal surgeon, reported findings consistent with incontinence due to pudendal neuropathy, the presence of which was confirmed by electromyography. Although he could not say what caused the neuropathy, the chronology suggested that the back injury might be the cause. He thought that the claimant might benefit from cord decompression.

When deposed, Dr. Tuckson testified that many things can cause neuropathy, among them spinal cord trauma due to a herniated disc in the upper lumbar region or an endocrine disorder such as diabetes. He reviewed an MRI interpretation, noting that he would have preferred to see bilateral rather than unilateral damage. Nonetheless, he found it to be consistent with a possible cause for the incontinence in light of the history that he received. Dr. Tuckson confirmed the importance of an accurate history when determining causation. He testified that he did not have any medical records when performing his evaluation but that the claimant reported a relatively immediate onset of incontinence after the 2005 injury. He acknowledged that he did not consider the fact that the claimant was diabetic when preparing his report and also acknowledged that uncontrolled diabetes could cause pudendal neuropathy. He remained convinced, nonetheless, that the work-related injury was the cause.

Deposed by the employer on March 21, 2007, Dr. Harpring testified that he saw no lesions severe enough to cause incontinence. He explained that

incontinence usually results from a very large herniated disc that causes severe central stenosis and that the films of the claimant's spine did not reveal a herniation severe enough to cause it. Moreover, one would expect more severe physical findings if a disc had progressed to that point. Asked whether a specialist in colorectal surgery or a board-certified neurosurgeon would be in a better position to determine the significance of a spinal cord condition in the development of incontinence, he stated, "I assume it would be me." He acknowledged that he had recommended a referral to determine the cause of the incontinence but remained steadfast that he would be in a better position than Dr. Tuckson to determine whether the low back condition was the cause.

The ALJ determined that the claimant's ability to work was limited by his non-work-related medical conditions and education but that the work-related injury, alone, was not totally disabling. Convinced that he could not return to his previous work, the ALJ based a triple partial disability benefit on the 5% permanent impairment rating that Drs. Bailey and Autry attributed to the injury rather than on the 13% rating that Dr. Harpring assigned. The ALJ explained that the order referring the claimant for a university medical evaluation directed the evaluator to address the existence and cause of bowel incontinence. Thus, Dr. Harpring's opinions regarding issues unrelated to incontinence were either inadmissible or not entitled to presumptive weight.

The ALJ noted that two university evaluators testified concerning the cause of the bowel incontinence. Acknowledging that Dr. Tuckson might be well qualified to determine whether incontinence existed, the ALJ found Dr.

Harpring, a board-certified neurosurgeon, to be better qualified to determine whether the herniated disc caused the incontinence. The ALJ also determined that Dr. Tuckson received an incorrect and incomplete medical history[2] and failed to review certain medical records or to consider the fact that the claimant had not taken the medication prescribed for his diabetic condition for two years. The ALJ concluded from Dr. Harpring's testimony that the herniated disc did not cause the claimant's incontinence.

The claimant's petition for reconsideration argued that the ALJ failed to give presumptive weight to the 13% impairment rating that Dr. Harpring assigned or to Dr. Tuckson's opinion regarding the cause of the incontinence. He also argued that his limitations were severe and took a person of his age, limited education, and work experience out of the work force. Denying the petition, the ALJ stated that the best evidence of record showed the bowel condition not to be work-related; that the finding of partial disability was based on the entire record; and that the petition constituted no more than a re-argument of the facts. This appeal concerns the same arguments as well as an argument that the ALJ's opinion fails to reveal a consideration of all of the factors relevant to a finding of permanent total disability.

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[2] The claimant informed Dr. Tuckson that bowel and bladder incontinence began shortly after the March 2005 accident at work and continued thereafter. Dr. Tuckson acknowledged that he did not review Dr. Duplechan's records, which indicated that the claimant denied experiencing incontinence on April 26, 2005. According to medical records, the claimant informed Dr. Autry that it began shortly before the July 2006 evaluation and informed Dr. Harpring that it began not long before the December 2006 evaluation.

An injured worker has the burden to prove every element of a claim, including causation and the extent of disability.[3] KRS 342.285 designates the ALJ as the finder of fact with the sole discretion to determine the quality, character, and substance of evidence and to draw reasonable inferences.[4] A worker who fails to convince the ALJ must show on appeal that overwhelming favorable evidence compelled a favorable finding, in other words, that the ALJ's decision was so unreasonable as to be erroneous as a matter of law.[5]

KRS 342.315(1) permits an ALJ to request a university evaluation "whenever a medical question is at issue." When an ALJ requests such an evaluation, KRS 342.315(2) requires the evaluator's clinical findings and opinions to be given presumptive weight unless the order rejecting them "specifically state[s] . . . the reasons for rejecting that evidence." As construed by the court, KRS 342.315(2) creates a rebuttable presumption that the evaluator's clinical findings and opinions are accurate and requires the ALJ to state a reasonable basis for rejecting them.[6]

The ALJ did not err by refusing to give presumptive weight to Dr. Harpring's opinion that the March 2005 injury warranted a 13% impairment rating based on a herniated disc. When the ALJ ordered the first university evaluation, no issue existed regarding the impairment rating for the herniated

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[3] Roark v. Alva Coal Corporation, 371 S.W.2d 856 (Ky. 1963); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App.1984); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979).

[4] Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

[5] Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

[6] Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

disc or the degree to which the March 2005 injury contributed to it. The parties' physicians agreed that the injury produced a 5% impairment rating. Thus, KRS 342.315(1) did not authorize a university evaluation for that purpose. The sole medical questions at issue were whether the claimant experienced incontinence and, if so, whether the injury caused it. The orders of October 23, 2006, and October 24, 2006, clearly and properly limited the university evaluation to those issues. Nothing in the latter order indicated that the request for "all information required by Form 107," related to impairment and restrictions due to anything but the bowel condition.

The ALJ did not err by relying on Dr. Harpring's testimony to conclude that the claimant's back injury did not cause his incontinence. Both Dr. Harpring and Dr. Tuckson were asked to evaluate the existence and cause of the incontinence. Nothing refuted Dr. Tuckson's opinion that the claimant suffered from bowel incontinence and that pudendal neuropathy was the immediate cause. Thus, the issue became whether the back injury or some other condition caused the neuropathy.

The ALJ determined reasonably that Dr. Harpring was more persuasive than Dr. Tuckson regarding causation. The physicians who testified concerning the matter agreed that a number of conditions could cause incontinence. Dr. Harpring's report recommended further work-up by a urologist or proctologist but also indicated that he did not consider the herniated disc to be severe enough to cause incontinence. Neither the report nor Dr. Autry's opinion that a gastroenterologist would be the better expert to

determine the existence and cause of the alleged incontinence conflicted with Dr. Harpring's testimony that a neurosurgeon was in a better position than a colorectal surgeon to determine whether the claimant's herniated disc was severe enough to cause pudendal neuropathy or incontinence. A reasonable interpretation of Dr. Harpring's entire testimony on causation was that he ruled out the herniated disc as the cause and thought that a proctologist would be in the best position to determine an alternate cause.

Although Dr. Tuckson acknowledged that a number of conditions could cause pudendal neuropathy, he did not review all of the relevant medical records. After reviewing the MRI report and considering the fact that the claimant was diabetic, he remained steadfast in his opinion that the injury caused the neuropathy. Nonetheless, he based the opinion largely on the history related by the claimant, which was inconsistent with the history documented in the medical records. Nothing required the ALJ to give his opinion greater weight than Dr. Harpring's.

KRS 342.0011(11)(c) bases a finding of permanent total disability on "a complete and permanent inability to perform any type of work as a result of an injury," and KRS 342.730(1) prohibits non-work-related impairment from being considered. Having failed to request specific findings concerning the extent of his disability, the claimant cannot now complain that the ALJ failed to make them. The ALJ quoted extensively from McNutt Construction/First General

Services v. Scott[7] concerning the standard for distinguishing partial from total disability under the statutes and determined that the claimant was partially disabled. The opinion notes his age, educational level, and lack of specialized or vocational training as well as the type of work he performed and his post-injury physical limitations, all of which reveal a consciousness of the relevant factors. Although the claimant may have significant restrictions, we are not convinced that the evidence compelled a finding that his work-related injury alone rendered him totally disabled.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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[7] 40 S.W.3d at 859-60. See also Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000).

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V.

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WORKERS' COMPENSATION BOARD NO. 05-WC-92344

RADAC CORP., ET AL. — APPELLEES

**ORDER DENYING PETITION FOR REHEARING AND MODIFICATION**

The Petition for Rehearing and Modification, filed by the Appellant, of the Memorandum Opinion, rendered October 29, 2009, is DENIED.

All sitting. All concur.

ENTERED: April 22, 2010.

CHIEF JUSTICE