

**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**NOT TO BE PUBLISHED OPINION**

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE  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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,  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BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED  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.

# Supreme Court of Kentucky

2012-SC-000036-WC

ICG HAZARD, LLC

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS  
CASE NO. 2011-CA-000148-WC  
WORKERS' COMPENSATION NO. 09-86461

DEREK FARMER;  
HONORABLE JOSEPH W. JUSTICE,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

## MEMORANDUM OPINION OF THE COURT

### REVERSING

Appellant, ICG Hazard, LLC, appeals from a Court of Appeals decision which vacated the dismissal of Appellee, Derek Farmer's, claim for workers' compensation benefits for cumulative trauma. Finding the Court of Appeals opinion to be unsupported by the record, we reverse and reinstate the original decision by the Administrative Law Judge.

Farmer filed a claim for benefits arguing that he had suffered a hernia, hearing loss, and cumulative trauma to his cervical and lumbar spine while working for ICG. The Administrative Law Judge held that Farmer was not entitled to benefits for his injuries, but did award him medical and treatment expenses for his hernia and hearing loss. The ALJ completely dismissed

Farmer's cumulative trauma claim based on the report of Dr. Michael Best who found that Farmer had 0% impairment. The ALJ believed Dr. Best's report was more reliable than Farmer's expert witness, Dr. Robert Johnson who found that Farmer suffered from a 10% impairment. Farmer subsequently filed a petition for reconsideration which was denied. The Workers' Compensation Board affirmed the ALJ's decision in all respects finding that his ruling was supported by substantial evidence.

The Court of Appeals reversed the Board and vacated the ALJ's original order in a two to one decision. The majority held that:

[o]nly Dr. Best found "0% impairment," an evaluation which the ALJ chose (as was his prerogative) to believe in rejecting this claim. And the Board affirmed. But the *only substantial evidence* in the record supports the very real existence of the injuries alleged – at least to the neck and lower back.

We are compelled to vacate the judgment of the Board in this case as we are persuaded that Farmer's injuries amply establish his entitlement to compensation.

(emphasis in original). The majority opinion does not indicate what substantial evidence in the record supports Farmer's claim of cumulative trauma.

Senior Judge Ann O'Malley Shake dissented and wrote that:

[t]he majority opinion acknowledges that the ALJ has the discretion to believe or disbelieve certain evidence, but nonetheless chooses to discredit that discretion. "[T]he fact that we may have decided differently does not mean that the decision of the Board was completely unreasonable or that a different decision was compelled.' *Special Fund v. Francis*, 708 S.W.2d 641, 644 (Ky. 1986). In order to effectuate a reversal, it must be shown that the record contained no evidence of substantial probative value to support the ALJ's decision. *Id.* Such a lack of evidence has not been demonstrated by Farmer or established by the majority opinion.

We agree with the reasoning exhibited in Senior Judge Shake's dissent.

The record sufficiently supports Dr. Best's impairment evaluation. We have been presented with no evidence to indicate that Dr. Best incorrectly diagnosed Farmer. In fact, Farmer's own expert only found he was impaired by 10%, hardly a large difference from Dr. Best's conclusion. As such, the ALJ did not abuse his discretion by choosing to believe Dr. Best's report.

Additionally, even if one accepts Farmer's expert witness, Dr. Johnson's 10% impairment finding, Farmer has still failed to prove he suffered cumulative trauma while working for ICG. In 1994, Farmer filed a claim for workers' compensation benefits claiming neck and low back pain. At that time, he received a permanent medical impairment rating of 19 to 24% from Dr. Christa Muckenhausen and an impairment rating of 18% from Dr. Gary McAllister. Farmer settled this workers' compensation claim in 1995. If one were to assume that Dr. Muckenhausen and Dr. McAllister's impairment ratings were correct (and we have no reason to believe they are not) then Dr. Johnson's impairment rating of 10% shows that instead of suffering further cumulative trauma, Farmer's physical condition actually *improved*. The facts in this matter do not support the conclusion that Farmer is entitled to benefits for cumulative trauma. Instead, the record before us provides substantial evidence to support the ALJ's dismissal of Farmer's cumulative trauma claim.

We accordingly reverse the Court of Appeals and reinstate the opinion and order of the Administrative Law Judge.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur.

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