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**NOT TO BE PUBLISHED OPINION**

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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE  
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CASE IN ANY COURT OF THIS STATE; HOWEVER,  
UNPUBLISHED KENTUCKY APPELLATE DECISIONS,  
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OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE  
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION  
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ACTION.

# Supreme Court of Kentucky

2013-SC-000057-WC

MEUTH CONCRETE

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS  
CASE NO. 2012-CA-001059-WC  
WORKERS' COMPENSATION NO. 11-00079

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

APPELLEES

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Appellant, Meuth Concrete, appeals from a Court of Appeals decision which upheld the vacating and remanding of an opinion and order by the Administrative Law Judge ("ALJ"). The ALJ dismissed a claim filed by Appellee, Derek R. Kindle, because he did not believe there was sufficient evidence to find that Kindle's work-related injury was the cause of his pulmonary emboli.<sup>1</sup> The Workers' Compensation Board believed that the ALJ failed to make sufficient findings of fact and improperly rejected the opinion of a university evaluator and thus vacated the opinion and order and remanded the matter to

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<sup>1</sup> Blood clots in the lungs.

the ALJ. Meuth Concrete now argues that the Board erred. We affirm for the following reasons.

Kindle was employed as a truck driver by Meuth. He suffered a work-related injury when he fell off the bed of his truck as he was pulling a poured concrete septic tank from its form. Kindle testified that his right leg was stuck between the septic tank and the truck's frame and that his left leg was pinned beneath his body. His right knee was fractured. Kindle received temporary total disability benefits, medical treatment, and physical therapy for four weeks. Kindle's right knee reached maximum medical improvement with no complications and he returned to full work duties.

After returning to work, Kindle began to experience extreme shortness of breath and numbness in his left leg. Doctors diagnosed Kindle with pulmonary emboli. The blood clots emanated from an aneurysm located behind Kindle's left knee. A filter was implanted in Kindle's left leg to catch the blood clots and a procedure was performed to remove the clots from his lungs. Kindle has not been able to return to work at Meuth.

Kindle filed an Application for Resolution of Injury Claim and a separate Application for Resolution of Occupational Disease Claim. Kindle alleged that he suffered an injury to his right lower extremity as a result of the prior work-related accident and that as a result he was diagnosed with chronic thromboembolic pulmonary hypertension and pulmonary embolism. The Department of Workers' Claims scheduled a university evaluation since Kindle claimed an occupational disease. KRS 342.316. Meuth argued that Kindle's

occupational disease claim should be dismissed because his vascular conditions were alleged to have risen from a work-related injury and not from hazardous occupational exposure. Meuth also contested the compensability of Kindle's pulmonary emboli arguing that it did not develop as a result of any injury to his right leg, as alleged in his Application for Resolution of Injury Claim, but instead his left leg.

Dr. Rafael Perez performed the university evaluation. He indicated that Kindle had been diagnosed with pulmonary thromboembolism. He believed that:

. . . Mr. Kindle had chronic thromboembolic disease developing before the [work-related injury]. The disease burden was low and impairment was minimal allowing him to continue his occupational and other physical activities satisfactorily. Following the [work-related event], Mr. Kindle had a dramatic decrease in his abilities to perform any physical activity as demonstrated by his symptoms and the objective studies noted above. I conclude that the [work-related injury] increased the amount of thrombus, or blood clots, in the injured extremities in an individual predisposed to this problem due to his popliteal venous aneurysm. A series of thromboembolic events to the lungs was sufficient to produce the severe pulmonary hypertension found after the injury.

Dr. Perez ultimately concluded that Kindle injured both of his legs when he fell from his truck and that he no longer has the respiratory capacity to perform work requiring physical activity. Dr. Perez assigned Kindle a 90% whole person impairment rating. A few days after the university evaluator's report was issued, Kindle amended his claim to include an injury to his left leg which contributed to his vascular issues.

Dr. Bruce Broudy, a Meuth expert witness, performed an independent medical evaluation of Kindle. He determined that Kindle's pulmonary emboli was caused by a thrombosed left popliteal aneurysm and did not believe Kindle's work-related accident caused the aneurysm. Instead, Dr. Broudy believed the aneurysm was of longstanding duration and might have even been congenital. He found there was no evidence to indicate that the aneurysm formed during the period of time surrounding the work-related accident. However, Dr. Broudy did admit that the extreme contortion of Kindle's left leg could have resulted in damage to the blood vessels in that area.

The ALJ believed the key issue in determining whether Kindle's claim was compensable is "whether the fall precipitated the thrombosis from the aneurism in the left leg." He then found that Kindle did not suffer from an occupational disease and that Dr. Perez should not have been appointed as a university examiner per KRS 342.316(1). Because of that determination, the ALJ did not give Dr. Perez's report "presumptive weight" as required by statute. He also believed that Dr. Perez's opinion and assessment was influenced by an incorrect medical history given to him by Kindle. Specifically, the ALJ thought Kindle told Dr. Perez the incorrect date on which his shortness of breath began and because Kindle did not have shortness of breath immediately after he fell from the truck, the pulmonary emboli was not work-related. However, the ALJ was also unsatisfied with Dr. Broudy's report, and found that neither of the two doctors established a link between the work-related accident and Kindle's pulmonary emboli. Kindle filed a petition for rehearing which was denied.

The Board vacated the ALJ's opinion and order and remanded the matter for additional fact finding. The Board concluded that the ALJ misunderstood the evidence and failed to render adequate findings of fact regarding whether the original work-related accident resulted in any physical trauma to Kindle's left leg. The Board also held that the university evaluator was properly appointed and that his opinion should have been given presumptive weight. However, in so holding, the Board incorrectly stated that the university evaluator's opinion had to be rebutted by "clear, convincing and positive proof." The Court of Appeals noted the error, but affirmed the Board. This appeal followed.

Meuth first argues that it was error for the Board to state that the university evaluator's opinion had to be rebutted by "clear and convincing" evidence. Admittedly the Board applied the incorrect standard. The correct standard is found in *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 95 (Ky. 2000), which states that the presumption in KRS 342.315(2) is governed by Kentucky Rule of Evidence 301. Thus, the university evaluator's testimony merely shifts to the opponent the burden of going forward with evidence to rebut the testimony.

Despite the fact that the Board used the wrong standard, the fact of the matter is that the university evaluator was properly appointed and therefore the ALJ should have given his opinion presumptive weight. Meuth's argument to the contrary fails. Kindle did allege an occupational disease and per KRS 342.315(1) a university evaluator must be appointed.

Additionally, the ALJ failed to provide sufficient findings as to why he disregarded Dr. Perez's report. KRS 342.315(2). There is no indication that Dr. Perez's opinion was based on an erroneous medical history provided by Kindle and thus, the ALJ's belief to the contrary is unsupported. Plus, while the ALJ believes that when Kindle's shortness of breath began is the key factor in determining if his pulmonary emboli was caused by his prior work-related accident, it does not seem as though that information was critical to Dr. Perez's conclusion. Instead, Dr. Perez believed that the accident accelerated the thromboembolic process in Kindle's body. Dr. Perez never indicated that Kindle would have had shortness of breath immediately after he fell from his truck if the accident caused the thromboembolic process to accelerate. The Board was correct in finding that the ALJ erred by not giving presumptive weight to Dr. Perez's opinion and that he did not provide sufficient reasons for that decision.

Meuth next argues that the ALJ made sufficient findings of fact supported by substantial evidence in his opinion and order. We disagree. In *Arnold v. Toyota Motor Mfg.*, 375 S.W.3d 56, 61-62 (Ky. 2012), we held that KRS 342.275(2) and KRS 342.285 "contemplate an opinion that summarizes the conflicting evidence concerning disputed facts, weighs that evidence to make findings of fact, and determines the legal significance of those findings."

Additionally we stated that:

[o]nly when an opinion summarizes the conflicting evidence accurately and states the evidentiary basis for the ALJ's finding does it enable the Board and reviewing courts to determine in the

summary manner contemplated by KRS 342.285(2) whether the finding is supported by substantial evidence and reasonable.

*Id.* at 62.

The opinion and order rendered by the ALJ does not satisfy the above standard. There are portions of the opinion and order which seemingly contradict themselves. For example, the ALJ finds that Kindle never gave a treating physician a history of the injury to his left leg. However, in a preceding paragraph the ALJ states that Kindle did provide a treating physician with that information, albeit it at a later time. The ALJ also failed to mention Dr. Broudy's explanation as to why Kindle's left leg injury might not have been reported immediately after he fell off of his truck.

The ALJ's opinion and order did not provide an evidentiary basis by which a reviewing body can determine if his ultimate finding was supported by substantial evidence and reasonable. As noted above, the ALJ focused on when Kindle began to experience shortness of breath to determine what caused the blood clots. But Dr. Perez never stated that the time in which Kindle began to experience shortness of breath was an indication that the pulmonary emboli were triggered. Instead, Dr. Perez believed it was the injury to his left leg which caused the clots to increase and gather in Kindle's lungs over a period of time. Thus, it cannot be determined whether the ALJ's opinion and order was based upon some evidence which was not summarized or upon a misunderstanding of the evidence. The Board correctly vacated the ALJ's opinion and order and remanded the matter to the ALJ for further proceedings.



Thus, for the reasons set forth above, we affirm the decision of the Court of Appeals.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ. sitting. All concur. Keller, J., not sitting.

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