

RENDERED: FEBRUARY 3, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001876-MR

CAROLYN WHOBREY

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 03-CI-01514

KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: BUCKINGHAM, JOHNSON, AND TACKETT, JUDGES.

JOHNSON, JUDGE: Carolyn Whobrey has appealed from the August 30, 2004, opinion and order of the Franklin Circuit Court which affirmed a decision of the Kentucky Retirement Systems denying Whobrey disability retirement benefits. Having concluded that the circuit court's decision affirming the Retirement Systems's denial of benefits was not clearly erroneous, we affirm.

Whobrey was employed by Jefferson County Schools as a bus driver. Her membership in the Retirement Systems began on September 1, 1980, and ended on February 11, 2002, her last day

of paid employment, with 226 months of accumulated service. Whobrey's job was classified as light-duty work¹ and consisted of driving a school bus,² performing routine maintenance on the bus, including lifting the bus hood which weighs approximately 50 pounds,³ operating a manual bus door, opening and closing windows, sweeping the bus, and maintaining discipline.⁴ Whobrey usually sat for six and one-half hours during an eight-hour work day and did not have the ability to alternate between sitting and standing.

Whobrey began to experience pain in her right shoulder and arm in December 2000. At that time, the regular bus she drove developed mechanical problems, and while it was being repaired, she was assigned a bus with a stiff steering mechanism. She advised her supervisor that she had to exert extreme force to turn the steering wheel on that particular bus.

¹ The work is primary sedentary. It requires the ability to communicate effectively using speech, vision, and hearing. The work requires the use of hands for simple grasping, pushing, and pulling of arm controls and fine manipulations. The work requires the use of feet for repetitive movements. The work requires bending, squatting, crawling, climbing, reaching, with the ability to carry, push, or pull medium weights. The work requires activities involving unprotected heights, being around moving machinery, exposure to marked changes in temperature and humidity, driving automotive equipment, and exposure to dust, fumes and gases.

² Sometimes Whobrey was assigned to a bus with a manual transmission, requiring her to shift gears with her right hand.

³ The Kentucky Department of Education, Kentucky Minimum Specifications for School Buses was entered as an exhibit into the record and states that the effort required to open the hood shall not exceed 25 pounds.

⁴ Whobrey did have an aide to assist her in this aspect of the bus route.

Over the next five weeks, the pain intensified. Whobrey was assigned another bus, but she had the same problem steering.⁵

On February 22, 2001, Whobrey was treated for a right shoulder, cervical, and trapezius strain at Occupational Physicians and was taken off work. She returned to work for a few days, but was then taken off work again. She began treating with Dr. Ellen Ballard on March 14, 2001.⁶ Dr. Ballard examined Whobrey and determined that she had a history of diffuse right shoulder pain. Dr. Ballard noted that upon palpation of the right shoulder, she had decreased range of motion with abduction and flexion, normal internal and external range of motion with reports of pain. She ordered an MRI scan, which revealed no acute finding other than a small joint effusion and no rotary cuff injury. Following a recheck on March 22, 2001, and again on April 5, 2001, Dr. Ballard stated Whobrey should not use her right arm. Dr. Ballard recommended physical therapy and referred Whobrey to Dr. Martin Schiller, an orthopedic surgeon.

Dr. Schiller examined Whobrey and in his report dated April 19, 2001, stated that in reviewing Whobrey's cervical x-

⁵ In 1997 Whobrey was involved in a bus accident. She was treated for neck and shoulder pain and received temporary total disability benefits while she was off work. She returned to work without any problems. In 1999 while driving a special needs bus, Whobrey sustained a right shoulder injury as she was repositioning the seatbelt holding a wheelchair in place. She was treated for the injury, but only missed a few days of work and did not receive any disability benefits.

⁶ Dr. Ballard reviewed the records from Occupational Physicians. X-rays of Whobrey's cervical spine and right shoulder showed some mild degenerative changes of the right AC joint, but no abnormalities.

rays, he found they were normal and saw no evidence of a rotator cuff tear. Dr. Schiller diagnosed Whobrey with possible subacromial bursitis and possible symptoms related to AC degeneration, but his impression was that her problems were psychosomatic. He administered cortisone injections, but Whobrey stated that she did not receive any benefit from the injections.

Dissatisfied with her treatment, Whobrey began treating with Dr. Eugene E. Jacob. Dr. Jacob examined Whobrey on June 21, 2001, and administered an injection into her right shoulder, which seemed to temporarily relieve Whobrey's pain. His diagnosis of Whobrey was chronic impingement of the right shoulder, i.e., a spur, which was pre-existing and aroused by Whobrey's work. Dr. Jacob asked Whobrey to consider surgery and kept her off work for two weeks. He stated in his records that if Whobrey refused surgery, she would have to return to work.

Dr. Jacob performed an arthroscopic subacromial decompression on Whobrey's right shoulder on September 25, 2001. Following the surgery, Whobrey began physical therapy, but continued to complain of pain in her right shoulder. The report of Frazier Rehab Institute notes that Whobrey attended 19 out of 20 prescribed physical therapy sessions, and she made some progress, but still complained of pain. On December 28, 2001, an MRI was performed, post-surgery, which showed a small partial

surface rotator cuff tear. Dr. Jacob and his partner, Dr. Greg Rennirt, who provided a second opinion, determined that Whobrey had developed post-surgery adhesive capsulitis, or stiffness of the shoulder, and recommended Whobrey undergo manipulation of her right shoulder. Whobrey opted not to undergo that procedure because of fear of additional complications and uncertainty of improvement.

Dr. Jacob assigned Whobrey a 12% permanent functional impairment rating based on the 5th edition of the AMA Guides to the Evaluation of Permanent Impairment, 10% of which he attributed to physical restrictions and 2% to chronic pain. He further recommended that Whobrey not perform overhead work, limited Whobrey to lifting five pounds, and stated that consistent pushing or pulling activity would aggravate her shoulder pain. He concluded that Whobrey was unable to drive a bus. However, he concluded that she could perform work at waist level.

In a utilization review report dated July 10, 2001, Dr. Daniel Woolen opined for purposes of Whobrey's workers' compensation case that the chronic changes in her shoulder were due to causes other than her employment. He concluded that the need for surgery was not related to her employment.

Whobrey filed her application for disability retirement benefits on February 12, 2002, and alleged that she

was no longer physically capable of performing her job duties.

Her reasons were stated as follows:

I am unable to drive, pre-trip my bus, push or pull wheelchairs, hook-up wheel chairs, pull open hood of bus. Climb up on hood to take care of cleaning windshield when needed. I am unable to help children off of bus in an emergency situation. I am unable to open a manual door. I am unable to do these things because of injury and torn rotator cuff on my right shoulder.

Whobrey was evaluated by Lance T. Chroghan, a physical therapist on February 12, 2002. He reported in a letter to Dr. Jacob that Whobrey had a whole person impairment for the shoulder of 10%, based on the Fourth Edition of the AMA Guides. However, he noted that the rating was obtained "with active shoulder motion against gravity." He stated that Whobrey "limited her motion due to pain and thus above ROM measurements do not reflect true full active motion" [emphasis original].

Whobrey was reevaluated by Dr. Ballard on April 8, 2002. Dr. Ballard performed an examination and diagnosed right shoulder pain, anxiety, shaking of the right upper extremity, and a history of rheumatoid and osteoarthritis. Dr. Ballard stated in her report that she felt there was no permanent impairment attributable to Whobrey's injury and could not assign a clear rating under the AMA Guides. Dr. Ballard stated that Whobrey did not "demonstrate the ability to return to work as a bus driver at the Jefferson County Board of Education."

However, this opinion was not based on an injury-related impairment, but rather "on her very subjective response to today's evaluation but also on her overall demeanor." Dr. Ballard further opined that Whobrey appeared to have psychological problems unrelated to the work incident.

In a medical report from Dr. Richard Edelson, a psychologist, who performed a psychological evaluation on May 10, 2002, Dr. Edelson opined that Whobrey suffered from a pain disorder associated with both psychological factors, impingement syndrome, and adhesive capsulitis. He explained that the pain in her right shoulder and the changes in her life which occurred because of her symptoms have "exacerbated" her depression, which then "exacerbated" her pain, resulting in a "chronic pain trap".⁷ He stated that Whobrey had a 10% functional impairment, with an additional 3% impairment rating for pain.

Dr. David Shraberg performed an independent psychiatric evaluation of Whobrey on June 24, 2002. He stated that both his testing and the testing performed by Dr. Edelson revealed a tendency of Whobrey to somaticize, when her symptoms were very mild. It was Dr. Shraberg's opinion that a number of life issues caused Whobrey to complain of a painful shoulder to allow her to rationalize her decision to retire. He diagnosed

⁷ Dr. Edelson stated that Whobrey reported her pain as excruciating, but rated it a "5" on a scale of 1 to 10 at its worst, with a normal rating being a "4".

Whobrey with an adjustment disorder of adult life associated with menopause and ulcerative colitis, and a personality dysfunction, including avoidant personality with strong somatic features, and symptom embroidering. He opined that Whobrey did not retain any permanent impairment due to her injury.

The Medical Review Board denied Whobrey's application for disability retirement benefits and she requested an evidentiary hearing, which was held on April 29, 2003. A Hearing Officer recommended denial of Whobrey's application for disability retirement benefits. The Retirement Systems agreed with the Hearing Officer and issued its findings and order on November 4, 2003, denying Whobrey's application. Whobrey sought judicial review of the Retirement Systems's decision. In an order and opinion entered on August 30, 2004, the Franklin Circuit Court affirmed the Retirement Systems's denial of benefits. This appeal followed.

Whobrey argues on appeal that (1) the decision of the Retirement Systems denying her benefits was not supported by substantial evidence on the record; and (2) that the decision was arbitrary because the Retirement Systems did not give weight to the findings of the Workers' Compensation Board.⁸ The crux of Whobrey's arguments is that because the Workers' Compensation

⁸ Whobrey states in her brief that she does not contest the medical findings as set out in the Hearing Officer's report.

Board reviewed the evidence in the case⁹ and previously found favorably for Whobrey, it is unreasonable that a different fact finder of a different agency would make a different ruling based on the same evidence. In support of this position, Whobrey argues that the standard to be met by a workers' compensation claimant for total disability¹⁰ is more stringent than that of a claimant before the Retirement Systems.¹¹

It is fundamental law "that administrative agencies are creatures of statute and must find within the statute warrant for the exercise of any authority which they claim" [citation omitted].¹² KRS 61.600(3)(a) requires that the person seeking benefits must have been, since his or her last day of paid employment, mentally or physically incapacitated to

⁹ Whobrey argues that with the exceptions of the physical therapy notes, updated notes from Dr. Jacob, and her direct and cross examination, the record is exactly the same for both agencies. However, we find the record includes other evidence, including the opinions of the doctors on the Medical Review Panel. Further, the Frazier Rehab Institute reports indicate that Whobrey had a good prognosis and that all of her goals were achieved except for her claims of pain.

¹⁰ The standard under Kentucky Revised Statutes (KRS) 342 defining total disability is the inability to return to any kind of work available that she can perform.

¹¹ Whobrey cites cases from the United States Court of Appeals for the Sixth Circuit in support of this position. We do not find this argument persuasive.

¹² Department for Natural Resources & Environmental Protection v. Stearns Coal & Lumber Co., 563 S.W.2d 471, 473 (Ky. 1978). See also Pearl v. Marshall, 491 S.W.2d 837, 839 (Ky. 1973) (stating that "findings of fact are essential to support the orders of administrative agencies, at least where the order issued by the agency rests upon a factual determination. . . . The goal of the administrative process must be to insure uniformity of treatment by administrative agencies to all persons who are similarly situated").

perform the job, or a job of like duties, from which he or she received his or her last paid employment, and such proof must be based on objective medical evidence. Furthermore, the incapacity must be deemed permanent.¹³ A claimant for disability retirement benefits has the burden of proving she satisfies the statutory criteria which entitles her to those benefits.¹⁴

When a claimant is unsuccessful in obtaining administrative relief, the question on appeal is "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in [appellant's] favor,"¹⁵ and, whether the denial of the relief sought was arbitrary.¹⁶

"In determining whether an agency's action was arbitrary, the reviewing court should look at three primary factors. The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them. . . . Second, the court should examine the agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence. . . . If any of these three tests are failed, the reviewing court

¹³ KRS 61.600(3)(c).

¹⁴ See Energy Regulatory Commission v. Kentucky Power Co., 605 S.W.2d 46, 50 (Ky.App. 1980).

¹⁵ Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky.App. 1984).

¹⁶ Bourbon County Board of Adjustment v. Currans, 873 S.W.2d 836, 838 (Ky.App. 1994).

may find that the agency's action was arbitrary."¹⁷

"The test of substantiality of evidence is whether . . . it has sufficient probative value to induce conviction in the minds of reasonable men."¹⁸ Finally, it must be determined "whether or not the administrative agency has applied the correct rule of law to the facts so found."¹⁹

Our standard of review²⁰ of a circuit court's

¹⁷ Bowling v. Natural Resources & Environmental Protection Cabinet, 891 S.W.2d 406, 409 (Ky.App. 1995) (quoting Commonwealth, Transportation Cabinet v. Cornell, 796 S.W.2d 591, 594 (Ky.App. 1990)).

¹⁸ Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 308 (Ky. 1972) (citing Blankenship v. Lloyd Blankenship Coal Co., Inc., 463 S.W.2d 62 (Ky. 1970)).

¹⁹ Southern Bell Telephone & Telegraph Co. v. Kentucky Unemployment Insurance Commission, 437 S.W.2d 775, 778 (Ky. 1969) (citing Brown Hotel Co. v. Edwards, 365 S.W.2d 299 (Ky. 1962)).

²⁰ Pursuant to KRS 13B.150(1), "[r]eview of a final order shall be conducted by the court without a jury and shall be confined to the record[.]" Moreover, KRS 13B.150(2) states as follows:

The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:

. . .

- (b) In excess of the statutory authority of the agency;
- (c) Without support of substantial evidence on the whole record;
- (d) Arbitrary, capricious, or characterized by abuse of discretion; [or]

. . .

- (g) Deficient as otherwise provided by law.

affirmance of an administrative decision is to determine whether the circuit court's findings upholding the Retirement Systems's decision are clearly erroneous.²¹ The circuit court's role as an appellate court is to review the administrative decision, not to reinterpret or reconsider the merits of the claim,²² nor substitute its judgment for that of the agency as to the weight of the evidence.²³ Although a reviewing court might have come to a different conclusion had it heard the case de novo, such disagreement does not deprive the agency's decision of support by substantial evidence.²⁴ As long as there is substantial evidence in the record to support the agency's decision, the court must defer to the agency, even if there is conflicting evidence.²⁵

An administrative agency, such as the Retirement Systems, is "afforded great latitude" in evaluating evidence and determining the credibility of witnesses.²⁶ Further, "the possibility of drawing two inconsistent conclusions from the

²¹ Johnson v. Galen Health Care, Inc., 39 S.W.3d 828, 833 (Ky.App. 2001); see also Kentucky Rules of Civil Procedure (CR) 52.01.

²² Kentucky Unemployment Insurance Commission v. King, 657 S.W.2d 250, 251 (Ky.App. 1983); Kentucky Board of Nursing v. Ward, 890 S.W.2d 641, 642 (Ky.App. 1994).

²³ Kentucky Board of Nursing, 890 S.W.2d at 642.

²⁴ Bowling, 891 S.W.2d at 410.

²⁵ Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981).

²⁶ Bowling, 891 S.W.2d at 409-10.

evidence does not prevent an administrative agency's finding from being supported by substantial evidence" [citations omitted].²⁷ Indeed, an administrative agency's trier of facts may hear all the evidence and choose the evidence that he believes.²⁸

When considering a claim, an administrative officer is not required to provide a detailed analysis of the facts and the law.²⁹ However, he is required to set forth sufficient facts to support conclusions that are reached, so the parties understand the decision, and to permit a meaningful appellate review.³⁰ Although a finding for which there is substantial evidence may not normally be disturbed on appeal, the parties are "entitled to at least a modicum of attention and consideration to their individual case[,]"³¹ and to be certain that the decision was the product of a correct understanding of the evidence.³² After reviewing the entire record before us, we conclude that the circuit court's affirmance of the Retirement Systems's decision to deny Whobrey disability retirement benefits was not clearly

²⁷ Fuller, 481 S.W.2d at 307.

²⁸ Bowling, 891 S.W.2d at 410.

²⁹ Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526, 531 (Ky. 1973).

³⁰ Shields v. Pittsburgh & Midway Coal Mining Co., 634 S.W.2d 440, 444 (Ky.App. 1982).

³¹ Id.; See also Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47, 49-50 (Ky.App. 1988).

³² See Cook v. Paducah Recapping Service, 694 S.W.2d 684, 689 (Ky. 1985).

erroneous, as the Retirement Systems's decision was based on substantial evidence and was not arbitrary.

The Retirement Systems, in adopting the Hearing Officer's report, stated as follows:

The mechanism for the alleged injury described by [Whobrey] is very unusual. It is difficult to believe, as confirmed [by] several of the physicians, that driving a bus with stiff steering for five weeks would cause the type of injury alleged. Many of the physicians who have examined [Whobrey] have found her complaints of pain in her shoulder to be exaggerated and without physical cause. The objective findings upon physical examination are all essentially normal, except for her continued complaints of pain. Without objective medical proof, [Whobrey] is not entitled to disability retirement benefits.

The psychological evaluations in the record indicate some type of mental dysfunction, but there is no proof that [Whobrey] is disabled by reason of any mental condition.

In affirming this decision, the circuit court stated as follows:

The Board determined from objective medical evidence that Mrs. Whobrey's condition did not prevent her from returning to her previous employment. Her job duties as a school bus driver were classified as light in nature and included driving the bus, performing light maintenance needs, cleaning of the bus and discipline of students. Further, the Hearing Officer and Board determined that Mrs. Whobrey had failed to establish, based upon the objective medical evidence, that she was permanently disabled from returning to her job duties. The

findings of the Board and its decision to deny benefits were well within the limits of K.R.S. § 61.600. Additionally, Whobrey was afforded procedural due process. After her initial application for benefits was denied by the Medical Review Board, a formal hearing was held as requested by Whobrey. Petitioner Whobrey then filed exceptions and requested oral argument based upon the Hearing Officer's Findings of Facts and Recommended Order. Finally, upon entry of the Final Order denying her benefits, Mrs. Whobrey then appealed to this Court. Under Kentucky law, the Board's decision was not arbitrary. The Board is not required to afford weight or deference to the findings of the Workers' Compensation Opinion. The Board properly acted within the confines of its statutory authority and the decision was based upon substantial evidence.

The first part of Whobrey's argument is that that the Hearing Officer's conclusions were not supported by substantial evidence because the conclusions were "inconsistent with her own acknowledgement of the evidence." Whobrey argues that the rulings of the Workers' Compensation Board were acknowledged by the Hearing Officer, but ignored and thus the Hearing Officer did not consider the whole record. However, the Hearing Officer explicitly stated in her recommended order that she reviewed all the documents in evidence and relied upon them in making her decision. While the Hearing Officer stated that she was not bound by the factual and legal conclusions of the Workers' Compensation Board, she clearly stated that she considered those conclusions. In her discretion, the Hearing Officer found the

evidence presented regarding Whobrey's ability to continue working more compelling than the evidence regarding her alleged disability.

Whobrey also argues that the Hearing Officer improperly relied solely on evidence of record prior to Whobrey's surgery to determine that she was not disabled and that because there was no post-surgery medical evidence contrary to Dr. Jacob's opinion, his conclusions were uncontradicted and should have been accepted by the Retirement Systems. First, we do not find that the Retirement Systems only relied on medical evidence of record prior to Whobrey's surgery, and further we do not find that it was improper for the Retirement Systems to rely on the pre-surgery medical evidence in making its decision. In reviewing the record, it appears that the Hearing Officer relied on other evidence to make her determination, including the reports of the Medical Review Board and the IME reports of Dr. Ballard, physical therapist Chroghan, and Dr. Shaberg, which were all prepared post-surgery. Further, if the medical evidence prior to surgery indicated that surgery was unnecessary, and questioned Whobrey's truthfulness regarding her complaints of pain, it was still relevant. While Dr. Jacob's records do indicate that Whobrey has a condition regarding her

shoulder,³³ there was substantial evidence of record indicating Whobrey's condition was not totally and permanently disabling and justifying the Retirement Systems's denial of disability retirement benefits.

In the second part of Whobrey's argument, she states as follows: "The exclusion of the workers' comp award from consideration renders the agency action as arbitrary under all three prongs: (1) by failure to follow the statute and consider the record as a whole; (2) by denial of due process by excluding consideration of relevant evidence, per its regulation; and (3) by taking action not based on substantial evidence."³⁴ We have

³³ It could further be argued that Dr. Jacob's records contradict themselves. Notations in Dr. Jacobs's August 20, 2001, letter indicate that Whobrey had only a mild impingement and in his notes on June 21, 2001, he indicates that if she does not wish to have surgery, she should return to work. This seems to conflict with his statements as to her need for surgery.

³⁴ Whobrey concludes her argument by stating:

The question before [the Retirement Systems] was whether Whobrey suffered from a disabling condition which prevented her from returning to work. It does not matter that she became disabled as a result of her surgical intervention. It was not Whobrey's burden to demonstrate that she was initially disabled, or that the evidence of her disability prior to surgery was sufficient to meet the [Retirement Systems's] standard. Even if it is assumed that Whobrey received misguided medical treatment, and undertook surgery for a condition which existed only in her head, the proper measure of her evidence must be based upon the final results of her surgical treatment and the disability arising from the pain, limitation and problems she experienced.

While because of her years of service, it was irrelevant under the statute if her condition was pre-existing, we disagree with this argument because the statute states that she must be disabled from the date of her last day of work.

already held that the Retirement Systems considered the record of evidence as a whole and that the Retirement Systems's opinion was based on substantial evidence, in accordance with the appropriate statute. Whobrey's argument that she was denied due process because the Retirement Systems did not follow certain regulations is no more persuasive. Whobrey argues in her brief the following:

The Hearing Officer took no notice of the findings of the Workers' Compensation Board, its reasoning or its holdings. She engaged in no analysis to distinguish its findings. She treated it as though it did not exist. In doing so, she violated the necessary due process requirements of the Board's enabling legislation and regulations.

The regulation referred to is 105 KAR 1:210 Section (10), which states as follows:

- (1) The hearing officer may allow the applicant to introduce, among other evidence, the determination of Workers' Compensation or Social Security Administration awarding disability benefits to the applicant.
- (2) The hearing officer shall consider only objective medical records contained within the determination and shall not consider vocational factors or be bound by factual or legal findings of other state or federal agencies.

This regulation specifically states that the Retirement Systems's consideration of a workers' compensation award is permissive, but that the Retirement Systems is not bound by the

findings of other state agencies. The Hearing Officer can only consider objective medical evidence, which she did. We do not see any way that the Retirement Systems violated this regulation. None of the cases cited in Whobrey's brief support her claim.

We have reviewed the entire record and all medical evidence filed in Whobrey's claim, and although Whobrey continues to argue that "on the record as a whole, there was substantial evidence of objective findings, which led to surgery . . . which resulted in a severely disabling chronic pain condition[,] " we conclude that there was also substantial evidence to support the Retirement Systems's denial of disability retirement benefits and it was not an arbitrary decision. Accordingly, we cannot say the circuit court was clearly erroneous in upholding the agency's decision.

For the foregoing reasons, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Don Meade
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Katherine Rupinen
Frankfort, Kentucky