

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-001229-WC

SCHNEIDER TRANSPORT, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-83-27626

ROGER EACRET; HONORABLE R. SCOTT BORDERS,  
ADMINISTRATIVE LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \*

BEFORE: KELLER AND TAYLOR, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

KELLER, JUDGE: Schneider Transport, Inc. (Schneider) appeals from the decision of the Workers' Compensation Board affirming the Administrative Law Judge's (ALJ) finding that Schneider is liable for contested medical expenses incurred for treatment of Roger Eacret's (Eacret) end-stage renal disease. Before us, Schneider argues that the ALJ erred by not affording presumptive weight to the university evaluator's opinion and that

<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the ALJ's opinion is not supported by the evidence. For the reasons set forth below, we affirm.

## FACTS

On August 5, 1983, Eacret suffered a work-related low back injury. The parties ultimately settled that claim in 1992, leaving open Schneider's liability for payment of future medical expenses.

On August 15, 2005, Eacret filed a motion to reopen and medical fee dispute seeking payment of medical expenses that he had incurred from and after January 2001. In addition to various medical bills, Eacret attached a report from Dr. Mack Griffith, dated May 27, 2005. Dr. Griffith, who has provided pain management treatment to Eacret since April 2, 2002, stated that Eacret complained of low back pain dating to a 1983 work injury. Furthermore, Dr. Griffith noted that Eacret had undergone a number of surgical procedures as well as physical and injection therapy. Finally, Dr. Griffith noted that Eacret developed a massive epidural hematoma following surgery related to his spinal cord stimulator.

Eacret also attached a report from Dr. Lee Ray Crowe, dated May 28, 2002. Dr. Crowe stated that Eacret developed a large hematoma when the battery pack on his spinal stimulator was replaced on October 25, 2000. According to Dr. Crowe, Eacret developed "severe anemia, pulmonary edema, respiratory failure and acute renal failure." Eacret did not recover renal function, and Dr. Crowe attributed Eacret's end-stage renal disease and the need for dialysis to Eacret's work injury.

Schneider filed a response to Eacret's motion stating that it had undertaken utilization review (UR) in 2002 and the UR doctor determined that Eacret's renal failure was not related to the work injury. Furthermore, Schneider noted that neither Eacret nor his treating physician had sought review of the UR decision under the applicable regulations. Therefore, Schneider argued that Eacret's motion to reopen and medical fee dispute were untimely.

In support of its position that Eacret's condition was not work-related, Schneider filed the undated UR report from Dr. Danny Woo. Dr. Woo stated that Eacret had a history of alcohol and mixed substance abuse and had been hospitalized for substance abuse treatment in 1998. In addition to Eacret's back injury, Dr. Woo noted that Eacret suffers from chronic obstructive pulmonary disease, hypertension, congestive heart failure, and a history of chronic microscopic hematuria. Dr. Woo stated that Eacret underwent a spinal cord "generator" placement procedure and "then drove to Indiana against medical advice." Eacret was then admitted to the hospital for treatment of hypoxemia and he developed adult respiratory distress syndrome and kidney failure.

Following his review of the records, Dr. Woo concluded that Eacret's kidney failure was not related to the work injury. In support of his conclusion, Dr. Woo noted Eacret's "slight elevated creatinine . . . in 1998," his uncontrolled hypertension, and his alcohol abuse. Dr. Woo stated that Eacret's renal failure was not caused by overuse of pain medication because x-rays of Eacret's kidneys did not reveal small, shrunken kidneys, which is characteristic of analgesic nephropathy. Furthermore, Dr. Woo noted

that analgesic nephropathy generally progresses slowly over a number of years, not a number of days. Finally, Dr. Woo stated that Eacret's substance abuse, particularly abuse of cocaine and crack could have contributed to progressive renal failure. However, Dr. Woo noted that he was not an expert in issues related to alcohol and drug abuse.

For reasons that are unclear, Eacret filed a second motion to reopen and medical fee dispute on October 17, 2005, again alleging that neither his employer nor its workers' compensation carrier had paid outstanding medical expenses. Eacret attached the reports from Drs. Griffith and Crowe and several hundred pages of medical bills to this motion. Additionally, Eacret attached medical records from Dr. Crowe and Cookeville Regional Medical Center Hospital. Those records reflect treatment for end-stage renal failure as well as hypertension.

On May 9, 2006, the ALJ issued a Benefit Review Conference Order stating that the claim was placed in abeyance pending a medical evaluation pursuant to KRS 342.315.

In June of 2006, Schneider filed medical records from Dr. Crowe, again reflecting treatment for renal failure and hypertension, as well as for coronary artery disease and pancreatitis. We note that Dr. Crowe indicated that he was unsure if Eacret's renal disease was "some sort of chronic glomerulonephritis, analgesic nephropathy or primary hypertensive vascular disease."

Schneider also filed records from Dr. Ralph Atkinson. It appears that Dr. Atkinson treated Eacret following his kidney transplant for complaints of hypertension,

depression and anxiety disorder, and chronic pain. In a note dated June 2, 2003, Dr. Atkinson stated that Eacret's renal disease was "secondary to hypertension" and "presumably secondary to hypertension."

Schneider filed medical records from Pain Management Consultants. Dr. Miller noted that Eacret had undergone five lower back surgeries, physical therapy, trigger point injections, lumbar epidural steroid injections, massage therapy, and a kidney transplant, and had a history of taking opiates, muscle relaxants, and nonsteroidal anti-inflammatories, with use of a spinal cord stimulator. Furthermore, Dr. Miller noted that Eacret had undergone "drug rehabilitation in 1986 to help him taper off Darvocet."

On September 27, 2006, Eacret underwent an evaluation pursuant to KRS 342.315 with Dr. Thomas Waid at the University of Kentucky. Dr. Waid noted that Eacret suffered a work-related injury in the early 1980's that resulted in chronic low back, head, and neck pain. Eacret underwent "numerous back surgeries including a spinal nerve stimulator that was placed in October of the year 2000." Records indicated some evidence of poorly controlled hypertension and use of pain medications. Following spinal stimulator replacement surgery, Eacret "had severe complications," including a large hematoma, respiratory failure, pulmonary edema, and Acute Respiratory Distress Syndrome, ARDS. Dr. Waid noted that Eacret also developed acute renal failure at that time and a renal flow scan showed changes consistent with "acute tubular dysfunction." Eacret did not recover kidney function and underwent a transplant in 2004. Following his examination, Dr. Waid made diagnoses of chronic kidney disease, status post-kidney

transplant, hypertension, and work-related injury causing chronic back and neck pain with multiple back surgeries. As to causation of Eacret's kidney failure, Dr. Waid stated as follows:

We are asked to assess if patient's renal insufficiency is due to patient's work-related injury back in the year 1983. We, at this time, after reviewing his records, can tell that the patient does have a history of longstanding hypertension which clearly was not well controlled, based on blood pressure readings provided to us. Also, there is evidence that the patient had abnormal renal function in the year 1998 . . . . The patient did take chronic nonsteroidals after his work-related injury and we are not able to quantify how much, however the patient does tell us that he took high-doses of ibuprofen for a long period of time. Analgesic abuse nephropathy could have contributed to his hypertension and hypertension worsened his nephropathy. There is also some evidence that the patient had microscopic hematuria and had a cystoscopy done in the year 1999. Microscopic hematuria can be seen in analgesic abuse nephropathy resulting from papillary damage. The patient had severe complications after spinal nerve stimulator placement when he developed a hematoma, respiratory failure and acute renal failure. The patient did not recover renal function and was on hemodialysis after that. Based on prior records, what we can say at this time is that he had chronic kidney disease which could be secondary to uncontrolled hypertension for many years and/or possibly analgesic abuse. Then, the patient developed acute on [sic] chronic renal failure and did not recover. Most of the cases of acute tubular necrosis in the ICU setting do recover function but probably since this patient had an already abnormal renal function this could have played a role in his renal function not recovering.

On December 8, 2006, the ALJ ordered the claim submitted for a decision based on the evidence of record. It does not appear from the record that the ALJ conducted a hearing or that the parties submitted briefs. Following his review of the

evidence, the ALJ determined that treatment of Eacret's renal failure was related to the work injury, and he ordered Schneider to pay for Eacret's treatment related expenses pursuant to KRS 342.020. Schneider appealed the ALJ's decision to the Workers' Compensation Board (the Board), which affirmed. It is from the Board's opinion that Schneider now appeals.

### ANALYSIS

The ALJ has the sole discretion to determine the quality, character, and substance of the evidence and may reject any testimony and believe or disbelieve various parts of the evidence regardless of whether it comes from the same witness or the same party's total proof. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985); *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). If the party with the burden of proof fails to convince the ALJ, that party must establish on appeal that the favorable evidence was so overwhelming as to compel a favorable finding. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). The determinative question to be answered is whether the ALJ's finding is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law. KRS 342.285; *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). With this standard in mind, we will address Schneider's arguments.

Schneider first argues that the ALJ erred by not affording presumptive weight to the opinion of Dr. Waid. KRS 342.315 provides that, at the request of any party, or upon the ALJ's own motion, a claimant may be referred for an evaluation with a

physician at either the University of Kentucky or the University of Louisville. Because the clinical findings of the university evaluator are presumed to be unbiased, they

shall be afforded presumptive weight by administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. When administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.

KRS 342.315(2); *Magic Coal v. Fox*, 19 S.W.3d 88, 95-97 (Ky. 2000).

Dr. Waid stated in his report that Eacret's chronic kidney disease and renal failure "*could* be secondary to uncontrolled hypertension for many years and/or *possibly* analgesic abuse." (Emphasis added.) The ALJ, after reviewing Dr. Waid's report, found that Dr. Waid could not "specifically determine the cause of [Eacret's] acute renal failure." We agree with the Board that the ALJ made a reasonable interpretation of Dr. Waid's report. Dr. Waid stated that there could be two possible causes for Eacret's renal failure - hypertension or analgesic abuse. He did not state with any degree of certainty that either condition caused Eacret's renal failure or that any other condition caused Eacret's renal failure. Therefore, we discern no error in the ALJ's decision not to afford Dr. Waid's opinion presumptive weight.

Having determined that the ALJ was within his authority when he declined to afford Dr. Waid's opinion presumptive weight, we must determine if the evidence was so overwhelming as to compel a finding in favor of Schneider. We hold that it was not.

Schneider argues that the medical evidence, in particular Dr. Waid's statement regarding analgesic abuse and Dr. Woo's statements regarding Eacret's



substance abuse and traveling after surgery, compel a finding that Eacret failed to follow reasonable medical advice.

Initially we note, as did the Board, that the only issue listed on the Benefit Review Conference Order is whether Eacret's medical treatment is related to the work injury. Nowhere in the record, except in Schneider's briefs to the Board and this Court, is the issue of failure to follow medical advice raised as an issue. Thus, Schneider failed to preserve this issue for review. *See Eaton Axle Corp. v. Nally*, 688 S.W.2d 334, 337 (Ky. 1985).

However, had Schneider properly preserved the issue for review, the evidence would not have compelled a finding in its favor. KRS 342.035(3) precludes compensation to the extent that death or disability "is aggravated, caused, or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice." The statute encompasses medical advice that, if followed, would have prevented further injury or disability, and it requires the worker to mitigate his damages. *Allen v. Glenn Baker Trucking, Inc.*, 875 S.W.2d 92, 94 (Ky. 1994). The employer has the burden of proving that the worker failed to follow competent medical advice, that the failure was unreasonable, and the unreasonable failure caused the disability for which compensation is denied. *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334, 336 (Ky.App. 1995).

KRS 342.035(3) relates to compensation for *disability or death*, not compensation for medical treatment. Since Eacret was only seeking compensation for

medical expenses, KRS 342.035(3) has no application. *See Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334, 337 (Ky.App. 1995). Furthermore, we note that, although Dr. Woo states that Eacret failed to follow medical advice when he traveled to Indiana after his surgery, there is no evidence that the failure to follow that medical advice was unreasonable. Finally, we note that Schneider argues that Dr. Woo's statement that Eacret abused analgesics is proof that Eacret failed to follow medical advice. However, Schneider also argues that, based on Dr. Woo's opinion, Eacret's renal failure could not have been the result of analgesic nephropathy. If the ALJ had accepted Dr. Woo's opinion regarding a lack of causal connection between analgesic abuse and Eacret's renal failure, the ALJ could not then have found that Eacret's abuse of analgesics aggravated, caused, or continued Eacret's disability.

Finally, Schneider argues that the ALJ's opinion was not supported by credible evidence. In support of this argument, Schneider states that "the medical evidence is overwhelming on the issue of other causes for the renal failure aside from the work-injury some 23 years ago." As noted by the Board, the fact that Schneider can point to evidence that might support its theory does not mandate a finding in its favor by the ALJ. *See McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974). As previously noted, the ALJ is free to believe or disbelieve various parts of the evidence regardless of whether it comes from the same witness or the same party's total proof. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). In this case, the ALJ simply chose to believe Dr. Crowe rather than Dr. Woo, which is within his purview. Having

reviewed the evidence, we discern no abuse of discretion by the ALJ and hold that the evidence was not so overwhelming as to compel a finding in favor of Schneider.

### **CONCLUSION**

For the above reasons, we affirm the Board's decision.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Laurie Goetz Kemp  
Louisville, Kentucky