

**FILED**  
JUL 11 2014  
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SUPREME COURT

COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
CASE NO. 2014- SC-000236  
(2013-CA-001712 WC)

MICHELLE RAHLA

APPELLANT

BRIEF ON BEHALF OF APPELLANT MICHELLE RAHLA

MEDICAL CENTER AT BOWLING GREEN  
HON. JEANIE OWEN MILLER, ALJ,  
WORKERS COMPENSATION BOARD, AND KENTUCKY COURT  
OF APPEALS

APPELLEES

Respectfully Submitted,

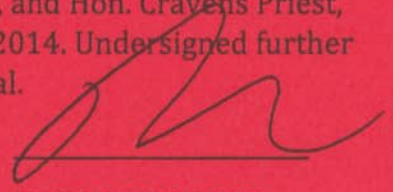


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and ten copies were sent REGISTERED MAIL to: The Clerk of The Supreme Court of Kentucky, 700 Capitol Ave. Room 235, Frankfort, KY 40601, and copies to Samuel P. Givan, Clerk, KY Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601, Department of Workers Claims, Workers Compensation Board, Prevention Park, 657 Chamberlin Ave., Frankfort, KY 40601, Hon. Jeanie Owen Miller, ALJ, P. O. Box 2070, Owensboro, KY 42302, and Hon. Cravens Priest, P.O. Box 770, Bowling Green, KY 42102, this 10<sup>th</sup> day of July, 2014. Undersigned further certifies that Appellant has not withdrawn the record on appeal.

*OVERTNIGHT*  
~~REGISTERED~~



PHILLIPE W. RICH

## INTRODUCTION

The is an Appeal of a workers compensation case by the Appellant, Michelle Rahla, from an Opinion of the Court of Appeals which affirmed opinions of the ALJ and Workers Compensation Board who ruled that injuries that Rahla sustained during a pre-employment examination were not compensable.

## STATEMENT CONCERNING ORAL ARGUMENT

Inasmuch as this issue presented herein is one of first impression for this Court, the Appellant would welcome an opportunity to present oral arguments to this Court.

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## I. STATEMENT OF THE CASE

Appellant Michelle Rahla ("Rahla") is a 39 year old resident of Bowling Green, Kentucky.

In late 2011 or early 2012, Rahla completed an on-line application for employment with Appellee Medical Center at Bowling Green (The Medical Center) as a PRN Registration Clerk.

Following two face to face interviews with representatives of The Medical Center, Rahla, by letter dated February 1, 2012, was offered the position for which she had applied, contingent upon her passing a physical examination and a substance abuse screen. The letter that Rahla received on that date required included a section determining her "base salary" and a requirement of a "physical examination and substance abuse screening." There was an appointment scheduled for Rahla to complete the physical examination for February 3, 2012. (*Id.* at 19).

During that physical examination, Rahla underwent a "Functional Capacity Evaluation" or FCE. During the FCE portion of the exam, Rahla experienced pain in her neck, however she nevertheless passed both the physical exam and the drug screen and subsequently began employment with The Medical Center.

Several weeks into her employment Rahla underwent neck surgery to correct the injury sustained during the physical examination ordered by her employer. (*Id.* at 28-29). While off from work recovering from the neck surgery, The Medical Center terminated Rahla's employment. (*Id.* at 30).

A Workers Compensation claim was subsequently filed and assigned to ALJ Jeanie Owen Miller. The claim was bifurcated on the issue of whether Rahla was subject to the provisions of the Kentucky Workers Compensation Act.

In an Opinion and Order rendered on March 21, 2013, the ALJ dismissed Rahla's claim. In reaching this conclusion, the ALJ determined that Rahla was not employed by the Medical Center when she underwent the FCE, and therefore not subject to the protections of the Workers Compensation Act.

This matter was then appealed to the Workers Compensation Board which affirmed the ALJ. In an Opinion rendered September 6, 2013. Essentially, the Board agreed with the ALJ that Rahla didn't meet the definition of an employee under the Workers Compensation Act, and therefore was not covered under the Act. While the Board acknowledged that Section 26.02 (6) of Larson's Workers Compensation Law supported Rahla's position, it offered no insight as to why it was rejecting that line of reasoning.

Rahla then filed a Petition for Review with the Kentucky Court of Appeals. In an Opinion rendered April 11, 2014, The Court of Appeals affirmed the Board (and ALJ).

In refusing to extend workers compensation protection to persons injured while undergoing an employer mandated FCE, the Court found that "Rahla's physical examination offered no direct benefit to the employer;"

This Appeal follows.

## II. ARGUMENT

### Injuries sustained by job candidates during pre-employment physicals or FCEs should be deemed compensable under Kentucky Workers Compensation Law

This is an issue of first impression for this Court: Should injuries sustained by job candidates during pre-employment physicals or FCE's be deemed compensable under Kentucky Workers Compensation Law?

While the Court of Appeals answered the above issue in the negative, that Court oversimplified if not misstated Rahla's position when it appeared to conclude that Rahla relied solely upon Hubbard v. Henry, 231 S. W. 3d 124 (Ky. 2007) in support of her position. To the contrary, while Rahla cited Hubbard in her brief, Rahla acknowledges that that case does not squarely fall within the fact situation of the present case.

Indeed, Rahla has consistently framed the issue before this Court as one of first impression. And, just as in numerous times in which litigants have been faced with a workers compensation issue of first impression, Rahla, much like this Court, has consulted Arthur Larson's exhaustive treatise on Workers Compensation Law. The number of reported workers compensation cases in which this Court has consulted Larson are too numerous to list.

Cognizant of the importance the Courts of the Commonwealth have placed in Larson's authoritative work, Rahla devoted much of her brief at the Court of Appeals to Larson's summary of the issue of whether employment candidates injured during a pre-employment physical should be subject to workers compensation protection. Yet, without explanation, the Court of Appeals completely ignored Rahla's reference to Larson and instead stated that "Rahla offers no case law" in support of Rahla's theory.

And, again, while there is no Kentucky case directly on point, it is simply inaccurate to state that there is no authority for Rahla's position.

Indeed, in section 26 of his treatises Larson's outlines the issue presently facing this Court. Larson begins by noting that workers comp benefits are routinely extended to claimants who have either not yet attained, or no longer retain the status of "employee". For example, benefits have been awarded to persons who have sustained injuries shortly after quitting or being fired. Such persons are "deemed to be within the course and scope of employment for a reasonable period while winding up his or her affairs and leaving the premises" 2 Lex K. Larson, Larson's Workers Compensation. Section 26.01 (Matthew Bender, Rev. Ed.) Significantly, compensability is permitted in these situations despite the absence of an employer/employee relationship.

From there, Larson moves closer (but not squarely) to the issue presently before this Court: He discusses injuries that occur during try-out periods before hiring. Here, Larson notes, "It is appropriate, quite apart from the strict contract situation, to hold that an injury during a try-out period is covered..." Larson, Section 26.02[6].

This rule framed by Larson was adopted by this Court in Hubbard v. Henry, 231 S.W.3d 124 (Ky. 2007) In that case, Henry, a timber cutter, agreed to work on a trial basis (without pay) to demonstrate his timber cutting ability to Hubbard. Not surprisingly, Henry was injured during his "try-out". Yet, his injuries were found compensable despite the lack of a formal employment relationship.

The rule of law in Hubbard is not controlling on the issue presently before this Court. It is relevant only in the sense that it demonstrates that compensability will not be denied based upon a rigid requirement of a formal employment relationship.

Unfortunately, The Court of Appeals focused almost exclusively on Hubbard, and in so doing, “missed the forest for the trees”.

For indeed, had the Court of Appeals pressed further, it would have encountered that Larson’s analysis of this issue took him from identifying instances of compensability in the post-employment setting, to compensability in pre-employment “try out” periods, to the specific issue before this Court, namely, the compensability of pre-employment exams/FCEs. On this issue, Larson states, “*It is also appropriate to treat a pre-employment physical examination as part of employment.*” Larson, Section 26.02[6].

Several jurisdictions follow Larson’s guidance. In Fisher v. Poole Truck Line, 944 S. W. 2d 853 (Ark. App. 1997), an applicant was injured while taking a urine test to the employer. The court found that “the physical exam was wholly for the benefit of the employer.”

In Dodson v. Workers Comp Division, 558 S.E. 2d 635 (W. Va. 2001) the West Virginia Supreme Court found an applicant’s injuries sustained while undergoing a pre-employment agility test compensable. The Court found significant that the offer of employment was conditioned upon submitting to, and passing the test; that it benefitted the employer, and that it exposed the claimant to risk of physical injury.

Much like the claimant in Dodson, Rahla received an offer of employment conditioned upon submitting to and passing the test. And while it must also be noted that other jurisdictions have declined to follow Larson’s rule, it must be pointed out that many of those jurisdictions do so in light of evidence that passage of the exam by the applicant did not guarantee an offer of employment. See, Boyd v. Montgomery, 515 So. 2d 6 (Ala. App.



1987), Younger v. City & County of Denver, 810 P. 2d 647 (Colo. 1991), or that the applicant failed to pass the test. Gebhard v. Dixie Carbonic, 625 N. W. 2d 207 (Neb. 2001).

Of course, none of those factors apply here. Rahla was offered employment, conditioned upon submitting to, and passing a physical exam.

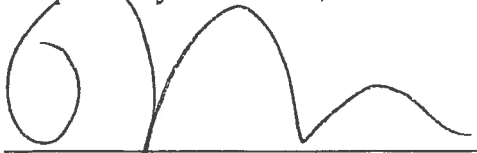
A final point requires mention: The Court of Appeals in declining to extend compensability to Rahla noted that, "Rahla's physical examination offered no direct benefit to the employer;" Without question, The Medical Center derived a benefit from the FCE, the exam and the drug screen. Indeed, the fact that the Medical Center *required* the screenings is conclusive proof that they derived some benefit from it. Certainly, the Medical Center had an interest in hiring drug free employees who were physically able to perform the functions of the job. Rahla passed the exam, and began employment with the Appellant. This appears to be precisely the type of situation envisioned by Larson as meriting compensability.

The Opinion of the Court of Appeals, which reached the opposite result, is contrary to relevant law, and should be reversed.

#### CONCLUSION

In light of the above, we submit that the Court of Appeals' Opinion, like the Board's Opinion, and ALJ's Opinion and Order, is contrary to relevant law, and we request that the Supreme Court reverse the Court's Opinion and remand this case the ALJ to make a finding of compensability.

Respectfully Submitted,

A handwritten signature in black ink, consisting of a large, stylized 'P' followed by a series of loops and a final flourish.

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