

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002323-WC

DAVID SMITH

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-01159

SHAMROCK COAL COMPANY;
HON. RICHARD JOINER, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION VACATING AND REMANDING

** ** * * * * *

BEFORE: DYCHE, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: The appeal before this Court involves an issue which was recently decided by our Supreme Court in the case of Hunter Excavating v. Bartrum, _____ S.W.3d _____ (Ky. 2005).

Because the ALJ did not allow additional evidence to rebut a consensus classification, it is necessary to vacate the Board's decision and remand to an ALJ for further proceedings.

David Smith filed his occupational disease claim on July 17, 2002, with the Department of Workers' Claims alleging coal workers' pneumoconiosis with a last exposure date of

January 15, 1997, while working for Shamrock Coal Company. Smith supported his claim with an x-ray dated May 10, 2002, and x-ray report of Dr. Matt Vuskovich, a "B" reader, who interpreted the film as revealing coal workers' pneumoconiosis, categorizing it as 1/1 under the ILO Classification System. Shamrock Coal Company submitted the medical report of Dr. Bruce Broudy, also a "B" reader, who reviewed an x-ray of Smith taken at the Lexington Clinic on September 24, 2002. He interpreted the film as completely negative for coal workers' pneumoconiosis and categorized it as Category 0 under the ILO Classification System.

Notice was given by the Department of Workers' Claims on January 21, 2003, that no consensus had been established. Pursuant to KRS 342.316, the Department of Workers' Claims then forwarded Smith's x-rays to three "B" readers for interpretation of the best quality film. Dr. Dahhan and Dr. McWhorter interpreted the x-rays as negative for coal workers' pneumoconiosis. Dr. Pope interpreted an x-ray as Category 1/0. Consensus of the panel "B" readers was declared by the Department of Workers' Claims on March 25, 2003, as being negative for pneumoconiosis. The ALJ would not consider additional evidence and denied the claim.

On appeal, Smith contends that KRS 342.316(3) and KRS 342.316(13) are unconstitutional as well as 803 KAR 25:009 §

3(1) and (2) to the extent that they prohibit additional reports of x-rays that were considered in the consensus process. This issue was recently decided by our Supreme Court in Hunter Excavating, _____ S.W.3d at _____, wherein the Court ruled:

803 KAR 25:009, § 3(1) exceeds its statutory authority by prohibiting additional x-rays and reports from being submitted to rebut a consensus. We conclude that KRS 342.316(3) is constitutional but that 803 KAR 25:009, § 3(1) and (2) conflict with KRS 342.316(13) to the extent that they prohibit additional reports of the x-rays that were considered in the consensus process. To that extent, they are void.

The ALJ did not allow additional evidence to rebut a consensus classification, therefore, it is necessary to vacate the Board's decision and remand to an ALJ for further proceedings.

For the foregoing reasons, the decision of the Workers' Compensation Board is vacated and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE SHAMROCK
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