

RENDERED: SEPTEMBER 30, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000040-WC

GARRY M. TURLEY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-01594

PEABODY COAL COMPANY; HON. R.
SCOTT BORDERS, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION BOARD;

APPELLEES

OPINION
VACATING
AND
REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Garry M. Turley petitions for review of an opinion of the Workers' Compensation Board affirming a decision by an administrative law judge (ALJ) dismissing Turley's claim for benefits. In light of the recent decision of the Kentucky Supreme Court in Hunter Excavating v. Bartrum, _____ S.W.3d

_____ (Ky. 2005), we vacate and remand for further proceedings.

On October 11, 2002, Turley filed a claim for benefits due to coal workers' pneumoconiosis. In support of his claim, he filed the x-ray interpretation of Dr. Matthew Vuscovich. Dr. Vuscovich's interpretation showed category 1/1 pneumoconiosis. The employer, Peabody Coal Company, then had an x-ray made, which was interpreted by Dr. Robert Pope. Dr. Pope's interpretation of this second x-ray stated no evidence of coal workers' pneumoconiosis. The x-rays were then sent to three "B-readers" pursuant to the consensus process described in KRS¹ 342.316. The consensus interpretation was negative.

The issue before the ALJ was whether Turley had coal workers' pneumoconiosis. In an opinion and order dated June 18, 2003, the ALJ dismissed Turley's claim finding that there was no clear and convincing evidence to reject the consensus interpretations. See KRS 342.316(13). The Board affirmed the ALJ's decision, and this petition for review by Turley followed.

In the proceedings before the ALJ and the Board, Turley challenged the constitutionality of the applicable statutes and regulations. The ALJ and the Board correctly noted that they did not have the authority to decide these issues. This petition for review was held in abeyance while the Kentucky

¹ Kentucky Revised Statutes.

Supreme Court considered the issues in the Bartrum case. The Court rendered an opinion in that case on May 19, 2005, and the opinion is now final. This case has now been returned to the active docket of this court.

In the Bartrum case, the Kentucky Supreme Court held that KRS 342.316(3) is constitutional, but that 803 KAR² 25:009, § 3(1) and (2), are invalid in that they prohibit a party from submitting additional reports of the x-rays that the B-readers evaluated and prohibited the ALJ from considering such reports. In light of this decision, we are compelled to vacate and remand in order to give Turley the opportunity to exercise the rights afforded to him by the Bartrum case.

Turley also argues the KRS 342.794(4) is an unconstitutional restraint on commercial freedom of speech. That statute provides that any physician whose interpretations are not in conformity with consensus reading 50% of the time shall be removed from the "B-reader" list. Turley argues that the threat of removal constitutes an unfair restraint upon any individual physician's expression of his professional opinion. We agree with Peabody Coal's argument that Turley lacks standing to challenge the statute. See City of Louisville v. Stock Yards Bank & Trust Co., 843 S.W.2d 327, 328-29 (Ky. 1992).

² Kentucky Administrative Regulations.

This matter is vacated and remanded for further proceedings consistent herewith.

ALL CONCUR.

BRIEF FOR APPELLANT:

Timothy J. Wilson
Lexington, Kentucky

BRIEF FOR APPELLEE, PEABODY
COAL:

Peter J. Glauber
Louisville, Kentucky

BRIEF FOR APPELLEE, LARRY M.
GREATHOUSE, COMMISSIONER:

Carla H. Montgomery
Andrew F. Manno
Frankfort, Kentucky