

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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000041-WC

WILLIAM STEVENS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-01891

PEABODY COAL COMPANY;
HON. BONNIE C. KITTINGER,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
VACATING
AND
REMANDING

** ** * * *

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

BUCKINGHAM, JUDGE: William Stevens petitions for review of an opinion of the Workers' Compensation Board affirming a decision by an administrative law judge (ALJ) dismissing Stevens'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 November 12, 2002, Stevens filed a claim for benefits due to coal workers' pneumoconiosis. In support of his claim, he filed the x-ray interpretation of Dr. B.T. Westerfield. Dr. Westerfield'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 Stevens had coal workers' pneumoconiosis. Stevens sought to get the x-rays so as to have additional doctors read and interpret them. The ALJ did not allow him to do so. In an opinion and order dated July 14, 2003, the ALJ dismissed Stevens'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 Stevens followed.

¹ Kentucky Revised Statutes.

In the proceedings before the ALJ and the Board, Stevens 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 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 Stevens the opportunity to exercise the rights afforded to him by the Bartrum case.

Stevens 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. Stevens argues that the threat of removal constitutes an unfair restraint upon any

² Kentucky Administrative Regulations.

individual physician's expression of his professional opinion.
We agree with Peabody Coal's argument that Stevens 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).

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

ALL CONCUR.

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