

RENDERED: SEPTEMBER 23, 2005; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000077-WC

CORNELIUS SIMPSON

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-02-01361

MANALAPAN MINING COMPANY;  
HON. BONNIE C. KITTINGER,  
ADMINISTRATIVE LAW JUDGE;  
KENTUCKY DEPT. OF WORKERS' CLAIMS;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
VACATING AND REMANDING

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BEFORE: MINTON, SCHRODER AND TAYLOR, 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.

Cornelius Simpson filed his occupational disease claim on September 6, 2002, with the Department of Workers' Claims alleging coal workers' pneumoconiosis. His application included an x-ray and a report interpreting the film as positive for black lung. Manalapan Mining Company responded with an x-ray and report reading negative for black lung. The Department of Workers' Claims circulated the films to three "B" readers who all reported negative findings. The Department announced a consensus and Simpson sought a hearing before the ALJ. The ALJ decided a consensus had been reached, and denied the claim. A number of arguments were presented to the Board on appeal. The Board considered a number of issues, including:

Does 803 KAR 25:009 § 3(1) exceeds [sic] the statutory authority granted to the Commissioner of the Department of Workers [sic] Claims in light of the express language of KRS 342.033, KRS 342.316(2), KRS 342.316(3)(b)4.g., and KRS 342.316(13)?

The Board ultimately denied the claim.

Simpson petitioned for a review to this Court on a number of grounds, including the interpretation of KRS 342.316, and how the Department concluded it reached a consensus, which is a roundabout way of addressing the above issue. Our Supreme

Court recently decided Hunter Excavating, \_\_\_\_\_ S.W.3d at \_\_\_\_\_, wherein the Court ruled:

We conclude, therefore, that KRS 342.316(3) does not deny parties a meaningful opportunity to rebut a consensus and that it is constitutional. In contrast, 803 KAR 25:009, § 3(1) and (2) defeat the purpose of KRS 342.316(13) and KRS 342.316(3)(b)4.g. by prohibiting a party from submitting additional reports of the x-rays the panel evaluated and prohibiting an ALJ from considering such reports. Therefore, they exceed the Department's authority to promulgate regulations and are invalid.

The ALJ did not allow additional evidence to interpret or to rebut the consensus classification, therefore, it is necessary to vacate the Board's decision and remand to an ALJ for further proceedings. In light of our remand, the other issues raised on appeal are moot.

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:

Mark L. Ford  
Harlan, Kentucky

BRIEF FOR APPELLEE MANALAPAN  
MINING COMPANY:

Gayle G. Huff  
Harlan, Kentucky