

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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000140-WC

JOE MARTINEZ

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-01692

PEABODY COAL COMPANY;
R. SCOTT BORDERS, ADMINISTRATIVE
LAW JUDGE; LARRY M. GREATHOUSE,
COMMISSIONER; AND THE WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * * * *

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.

Joe Martinez filed an occupational disease claim for coal workers' pneumoconiosis. Attached to the application was an x-ray report from Dr. Glen Baker, finding category 1/0 pneumoconiosis. Peabody Coal Company had Martinez examined by a "B" reader, Dr. Robert Pope, who had an x-ray made and interpreted the film as indicating no evidence of pneumoconiosis. Commissioner Greathouse sent a Notice that, given the two initial "B" reader reports filed in the claim, there was no consensus. The two x-ray films were forwarded to a panel of three "B" readers for interpretation. Dr. Ramakrishnan found category 0/1 pneumoconiosis; Dr. Rosenberg found category 0/1 pneumoconiosis; and, Dr. Dineen found category 0/0 pneumoconiosis. Commissioner Greathouse sent a notice that the three reports from the "B" readers had been reviewed and that there was now a consensus reading. The employer timely filed a Notice of Claim Denial and the claim was assigned to an Administrative Law Judge.

The ALJ reviewed the evidence and legal arguments, one of which was:

Whether 803 KAR 25:009 Section 3 is void, because the Department of Workers' Claims by and through the Commissioner has promulgated administrative regulations that contradict the provisions of KRS 342.316(13); and,

Constitutional issues.

The ALJ denied the claim and the Board affirmed. On review to this Court, one of Martinez's arguments is:

- A. Does 803 KAR 25:009(Section 3) violate Martinez's rights of equal protection and due process of law by contradicting and creating an impossible method of establishing clear and convincing evidence to rebut the presumption of a consensus process?

Although worded a little differently to this Court as argued before the ALJ, this issue was recently decided by our Supreme Court in 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 rebut a consensus classification, therefore, it is necessary to vacate the Board's decision and remand to an ALJ for further proceedings. In light of the Supreme Court's decision, and our decision to remand, Martinez's remaining arguments 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.

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