

**Commonwealth Of Kentucky  
Court of Appeals**

NO. 2004-CA-000141-WC

JIMMY D. SMITH

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-02-1509

PRESSLEY TRUCKING COMPANY;  
HON. W. BRUCE COWDEN, ADMINISTRATIVE  
LAW JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
VACATING AND REMANDING

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BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Jimmy Smith petitions for review of a decision of the Workers' Compensation Board which affirmed an Administrative Law Judge's order dismissing his claim for benefits for coal workers' pneumoconiosis. Smith contends 803 KAR 25:009 invalidates the provisions of KRS 342.316(13) which allows a claimant to present rebuttal evidence to overcome the "consensus". The recent Supreme Court case of Hunter Excavating v. Bartrum, \_\_\_\_S.W.3d\_\_\_\_ (Ky. 2005) is on point and controlling. Hence we vacate and remand to the ALJ for further proceedings consistent with this opinion.

Jimmy Smith filed a claim under KRS 342.316 for black lung benefits against Pressley Trucking Company alleging some 35 years in coal mining, both underground and in driving coal trucks. Smith filed an x-ray and an interpretation of the film as revealing coal workers' pneumoconiosis 1/0 under the ILO Classification System. Pressley Trucking supplied an x-ray and an interpretation that revealed negative for coal workers' pneumoconiosis.

Pursuant to KRS 342.316(3)(b)4., the Commissioner of the Department of Workers' Claims forwarded both films to three "B" readers for interpretation of the best quality film. Two of the B readers interpreted the x-ray as negative, Category 0, while the third B reader interpreted the x-ray as not completely normal, although he was of the opinion that the x-ray was negative for pneumoconiosis. The Commissioner determined a "consensus" was reached, which, under KRS 342.316(13), "shall be presumed to be the correct classification of the employee's condition unless overcome by clear and convincing evidence." 803 KAR 25:009 Section 3(1) (enacted pursuant to KRS 342.316(3)(b)3.) provides "[t]he parties shall not submit any additional x-ray readings except what is required by Section 2 of this administrative regulation."

Although Pressley Trucking took the depositions of two B readers, Smith only filed a pleading styled "Notice of Filing

of Medical Report" and resubmitted his original x-ray and its interpretation. The ALJ found there was no clear and convincing evidence presented to overcome the presumption and dismissed. Smith appealed to the Board contending the regulation effectively prevents a claimant from challenging the findings of the consensus procedure by limiting the medical evidence that a claimant may submit (only one x-ray and one interpretation). The Board affirmed.

On appeal to this Court, Smith contends that 803 KAR 25:009 Section 3(1) prohibits the parties from filing any additional x-ray readings, which in effect prevents him from effectively filing rebuttal evidence, which conflicts with the statute. Pressley Trucking counters that the consensus procedure and the presumption make it clear that the legislature intended for the consensus process to primarily control the ultimate determination and this is a legitimate legislative purpose. 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.

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.

Smith's remaining arguments become moot with our decision to remand the claim 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:

Johnnie L. Turner  
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