

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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2004-CA-001363-WC

LEONARD BAKER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-01308

SHAMROCK COAL COMPANY;
HON. W. BRUCE COWDEN,
ADMINISTRATIVE LAW JUDGE;
OFFICE OF WORKERS' CLAIMS; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: KNOPF AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.¹

TACKETT, JUDGE: Leonard Baker petitions this Court for a review of the decision of the Workers' Compensation Board, which affirmed the denial of his occupational disease claim for coal workers' pneumoconiosis. Baker argues on appeal that the consensus process for independent classification of x-rays outlined in Kentucky Revised Statute (KRS) 342.316(3)(b)(4) is

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

an unconstitutionally arbitrary exercise of power, and that the procedures of the Department of Workers' Claims prohibit a claimant from challenging the consensus classification. Under the recent decision by the Kentucky Supreme Court, Hunter Excavating v. Bartram, --- S.W.3d --- (Ky. 2005), we vacate and remand for further proceedings.

Baker filed a claim for benefits supported by medical evidence from Dr. Matthew Vuskovich, who interpreted a chest x-ray as showing category 1/1 coal workers' pneumoconiosis, or "black lung", in all six lung zones. The employer, Shamrock Coal, produced evidence from Dr. Bruce Broudy, who interpreted x-rays as showing category 0/1 pneumoconiosis in the upper four zones, which would mean that Baker would not be eligible for benefits. The Department of Workers' Claims, following procedure, referred the x-rays to B-readers, three physicians chosen at random from a list of qualified doctors. The three doctors, Glen Baker, Bapuji Narra, and T. E. Schultheis, interpreted the x-rays as 1/0, completely negative, and 0/1 respectively, which established a consensus that Baker did not have coal worker's pneumoconiosis. The consensus is presumed correct unless overcome by clear and convincing evidence. The ALJ determined that no clear and convincing evidence had been presented, and accordingly denied the claim. Baker appealed to

the Workers' Compensation Board, which affirmed, and this petition for review followed.

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 Baker the opportunity to exercise the rights afforded to him by the Bartrum case.

For the foregoing reasons, the decision of the Workers' Compensation Board is vacated and remanded.

ALL CONCUR.

BRIEF FOR APPELLANT:

Zaring P. Robertson
Richmond, Kentucky

BRIEF FOR APPELLEE SHAMROCK
COAL COMPANY:

Jeffrey D. Damron
Pikeville, Kentucky

² Kentucky Administrative Regulations.