

RENDERED: NOVEMBER 10, 2005; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-001399-WC

JAMES FRED JENKINS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-98-01201

B&S TRUCKING; HONORABLE SHEILA  
LOWTHER, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
VACATING AND REMANDING

\*\* \*\* \* \* \*

BEFORE: KNOPF AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

EMBERTON, SENIOR JUDGE: This appeal is one of several cases which were ordered abated pending a decision by the Supreme Court of Kentucky as to the constitutionality of the so-called "consensus procedure" set out in KRS 342.316(3). In Hunter

---

<sup>1</sup> 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.

Excavating v. Bartrum,<sup>2</sup> that Court determined that while the statute does not unconstitutionally infringe upon claimants' due process rights, the enabling regulations, KAR 25:009§3(1) and (2), are void to the extent that they conflict with the statute in prohibiting introduction of additional reports interpreting the x-rays utilized in the consensus process as a means of rebutting the consensus. Applying the holding in Bartrum to the facts of this case requires us to vacate the Board's decision and to remand Jenkins' claim so that he might be afforded an opportunity to attempt to rebut the consensus classification.

Appellant Jenkins filed his initial pneumoconiosis claim against appellee B&S Trucking on July 14, 1998, alleging that he developed the disease in the course and scope of his 28 years of employment in underground coal mining. Jenkins' claim was dismissed by the Administrative Law Judge in a March 1999 opinion and order which gave presumptive weight to the findings and opinion of the university evaluator. On July 28, 2003, Jenkins sought a reopening to have his claim reconsidered under KRS 342.316(3), as amended July 15, 2002, utilizing the two-step consensus procedure for evaluating x-ray evidence in pneumoconiosis claims. The Commissioner thereafter circulated the original x-ray of the university evaluator to a panel of "B" readers who reached a consensus of pneumoconiosis category 0/0.

---

<sup>2</sup> 168 S.W.3d 381 (Ky. 2005).

Based upon this negative consensus rating, the ALJ concluded that Jenkins had failed to make a prima facie showing of entitlement to additional benefits and denied his motion to reopen.

In his appeal to the Board, appellant Jenkins challenged the constitutionality of the consensus procedure and argued that 803 KAR 25:009 impermissibly deprives claimants of due process by denying them an opportunity to introduce additional evidence in an attempt to rebut the consensus procedure. Citing the limitations of its authority to pass upon the constitutionality of statutes and the regulations promulgated thereunder, the Board affirmed the decision of the ALJ. Jenkins now advances the same arguments in this forum.

Because it is clear that under the Bartrum analysis Jenkins' ability to rebut the consensus procedure was improperly limited by application of 803 KAR 25:009§3(1) and (2) to his claim, we are convinced that he is entitled to an opportunity to present additional medical reports of the x-rays which the panel evaluated for consideration by the ALJ in his motion to reopen his claim. Accordingly, the decision of the Workers' Compensation Board is hereby vacated and this case is remanded for additional proceedings consistent with the decision of the Supreme Court in Bartrum.

ALL CONCUR.

BRIEF FOR APPELLANT:

Johnnie L. Turner, PSC  
Shawn C. Conley  
Harlan, Kentucky

BRIEF FOR APPELLEE:

J. Gregory Allen  
Prestonsburg, Kentucky