

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002235-WC

PHILPOT ENTERPRISES

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-03-00852

DARYEL BANKS;
HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE; AND
THE WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: Philpot Enterprises petitions for review of an opinion of the Workers' Compensation Board that affirmed a decision of an Administrative Law Judge awarding permanent partial disability benefits to Daryel Banks. The issue on appeal is one of causation; specifically, whether the ALJ correctly determined, and the Board correctly affirmed, that

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

Banks contracted blastomycosis in the course of his employment as a heavy machinery operator at Philpot.

Banks was born on February 22, 1948. He has a seventh-grade education and has held a variety of jobs, including bulldozer operator in the coal mining industry. He lives on a twenty-acre farm. He worked full time for Philpot as a heavy equipment operator for approximately six weeks, from June 12, 2002, until July 25, 2002. Banks ran a bulldozer at a school building site, removing topsoil, and also grading the area across the road from the site. An old septic leach field was being removed from the school site at the time he worked there, but one of the other bulldozer operators was primarily responsible for performing the removal.

While he was thus employed, Banks began to develop sores all over his body. His family doctor was unable to diagnose his condition. Banks continued to develop more lesions, including one on his back that was three inches in diameter. He also experienced pain in his hip. He was admitted to hospital and given antibiotics. When he returned home, his left knee became swollen and his other symptoms continued. A biopsy was finally performed and he was diagnosed with blastomycosis.

Blastomycosis is a disease caused by a fungus that is found mainly in the Mississippi and Ohio River Valleys. It

predominates in warm, moist soil that is rich in organic debris. Humans contract the disease by inhaling the mold from the soil. This commonly happens on farms during the harvesting season or on construction sites when the soil is disturbed. It is a rare but debilitating disease that begins in the lungs and then manifests itself in lesions on the body. It can cause lung scarring and degeneration of the joints.

After the diagnosis, Banks was hospitalized in Lexington where he was treated by a specialist who later testified that he thought Banks might die of the disease; Banks recovered, however, and then spent time in a rehabilitative hospital.

Banks currently has problems with his left knee and his ankles, where the infection eroded the cartilage. He becomes fatigued easily and can no longer work as a bulldozer operator.

Banks filed a timely workers' compensation claim and a hearing was held before the ALJ on March 25, 2004. The ALJ determined that Banks had contracted blastomycosis while working at the Philpot site, and awarded him temporary total disability benefits from July 25, 2002, to June 24, 2003, and permanent partial disability benefits thereafter. The Board affirmed the decision on October 1, 2004.

On appeal, Philpot argues that sufficient evidence was not presented to prove that Banks contracted blastomycosis while working for Philpot, and that the Board therefore erred in affirming ALJ's award. Philpot maintains that because of the widespread nature of the blastomycosis spores, Banks should have been required to demonstrate that the spores were actually present at the work site. Philpot points out that Banks could have contracted the condition in any number of places, including his own farm.

"When there is conflicting evidence regarding questions of fact, the ALJ's determination cannot be disturbed."² "The duty of this Court is to correct the Board only where it has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."³

Philpot argues that the following evidence supports the view that Banks contracted the disease elsewhere:

Banks lives on a farm where he gardens; Banks described the soil at the work site as being moist rather than dusty, and as a result, it clumped up rather than being blown around (thereby reducing the possibility that he could have inhaled any spores); Banks worked primarily on the other side of

² Addington Resources, Inc. v. Perkins, 947 S.W.2d 421, 423 (Ky. App. 1997) (citation omitted).

³ Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687 (Ky. 1992); Whittaker v. Rowland, 998 S.W.2d 479, 482 (Ky. 1999).

road from the leach field; medical testimony was offered that the incubation period for blastomycosis ranges from 21-106 days with a medium of 45 days, yet Banks' coworkers testified that he had shown them sores on his back only two weeks after he began working for Philpot; one physician testified that if Burns had lesions on his body the size of a quarter or larger within only two weeks of beginning his employment with Philpot he must have contracted the disease elsewhere; some medical evidence indicated that Banks was already experiencing pain in his right hip and sores on his foot and ankle six months before the end of his employment with Philpot; and no evidence was offered to show the presence of blastomycosis spores on the job site, nor did an inspection of the site by the Kentucky Labor Cabinet OHSP identify the presence of blastomycosis fungal spores.

Essentially, this evidence can be grouped to support two avenues of attack on the ALJ's decision: first, that the spores were not present at the work site, and second, that Banks had contracted the infection before commencing his employment at Philpot. There is substantial evidence in the record, however, to refute these contentions. Robert R. Rapp, a physician retained by Philpot, prepared an opinion letter with an attached article from a scholarly publication that stated "only few investigators have recovered the [blastomycosis] organism from the soil." In light of this observation, Philpot's contention

that a claimant should have to prove the presence of spores at the work site would place an overly high, if not virtually impossible, burden of proof on the claimant.

Furthermore, although Banks' coworkers testified that he had shown them lesions on his body after only two weeks, Banks himself testified that the sores did not develop until after he had been working for Philpot for approximately one month.

The Board addressed these issues thoroughly, and we adopt the following relevant sections of its well-reasoned opinion:

This is an unusual claim to say the least. . . . Nevertheless, we have evidence of a definitive diagnosis, as well as opinion evidence of its work-relatedness. In Dealers Transport Co. v. Thompson,^[4] the court stated:

An occupational disease may be found if there is substantial evidence that either employment conditions specifically affected the employee in a manner resulting in contraction of disease, or employment conditions generally can [,] to a reasonable medical probability[,] cause a particular disease or condition in a given class of workers.

⁴ 593 S.W.2d 84, 88 (Ky. App. 1980), citing Princess Mfg. Co. v. Jarrell, 465 S.W.2d 45 (Ky. 1971).

Contrary to Philpot's arguments, we believe the evidence in the record supports a finding that Banks' blastomycosis was specifically contracted at work and his work as bulldozer operator put him at greater risk.

While Philpot makes much of the fact that actual blastomycosis spores were not found in the soil, as evidenced from the article attached to Dr. Rapp's report the spores are rarely found upon investigation. Instead, the primary issue appears to be one of the incubation period. Philpot attempted to prove Banks developed the sores earlier than possible for contraction with Philpot through the testimony of Banks' co-workers. However, Banks testified that he did not develop the sores until two weeks prior to his leaving his employment with Philpot. The ALJ, as was his right, chose to assign greater credibility to this testimony.

Contrary to Philpot's arguments, there is substantial evidence in the record to support the ALJ's finding of causation. The medical evidence established that an incubation period could be as short as three weeks. Since Banks began working June 12, 2002 and stopped working July 25, 2002, the time frame, as found by the ALJ, fits contraction and incubation of blastomycosis while Banks was working with Philpot. The ALJ's decision is supported by

substantial evidence in the record and we are without authority to disturb the result.

Because the Board did not commit an error in assessing the evidence so flagrant as to cause gross injustice, we affirm its opinion.

ALL CONCUR.

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