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Commonwealth Of Kentucky

Court Of Appeals

No. 1998-CA-0000489-WC

PEABODY COAL COMPANY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD
FILE NOS. WC-96-08675 & WC-96-07835

BILLY GENE HAWES; EDDIE BEALMEAR; HONORABLE SHEILA C. LOWTHER, ADMINISTRATIVE LAW JUDGE; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUDGEL, Chief Judge; DYCHE and KNOX, Judges.

DYCHE, JUDGE. We believe that the brief for appellant adequately and correctly sets out the facts and procedural history of this case, and we adopt that statement:

> On December 9, 1996, Billy Gene Hawes filed an Application for Adjustment of Claim with the Department of Workers' Claims seeking retraining incentive benefits pursuant to KRS 342.732(1)(a). Mr. Hawes alleged that he had contracted coal workers' pneumoconiosis as a result of 25 years of work as a coal miner, with his last date of work in the coal mining industry being April 7, 1995, while in the employment of Peabody Coal Company.
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> During the time for submission of proof, Mr. Hawes submitted medical reports from Drs.

Robert Powell and William Houser, with Dr. Powell finding evidence of category 1/0 coal workers' pneumoconiosis based upon his review of an x-ray taken as part of an examination he conducted on November 1, 1996, and Dr. Houser finding evidence of category 1/1 coal workers' pneumoconiosis based upon his review of an x-ray taken as part of an examination he conducted on September 3, 1996.

The employer also submitted medical reports from two physicians as evidence in the case, these physicians being Dr. Bruce Broudy, who found no evidence of coal workers' pneumoconiosis based upon his review of both the September and November, 1996 x-rays taken by Drs. Powell and Houser, and Dr. Ballard Wright, who classified the September 1996 x-ray taken by Dr. Houser as a category 0/0 and the November 1996 x-ray taken by Dr. Powell as a category 0/1.

The final medical report submitted as evidence in the claim came from Dr. Betty Joyce. Dr. Joyce was appointed by the Department of Workers' Claims as the "designated evaluator" pursuant to KRS 342.315 (as amended on December 12, 1996); and based upon her taking and review of a chest x-ray on March 13, 1997, Dr. Joyce classified that particular x-ray as category 0/1. As reflected by the Department of Workers' Claims filed, Dr. Joyce is a pulmonary specialist and, additionally, a B-reader of x-rays.

On August 29, 1997, Judge Lowther issued an Opinion in which she first considered whether the "presumptive weight" language used in KRS 342.315 accorded the medical opinion of the designated evaluator (Dr. Joyce) should be applicable to Mr. Hawes' claim. Judge Lowther determined that, although the "presumptive weight" language was not added to KRS 342.315 until December 12, 1996, and thus was not found in the Act as it existed on the day Mr. Hawes' last work in the coal mining industry on April 7, 1995, the "presumptive weight" language was a procedural (remedial) change in the Act and thus was applicable to the adjudication of

Mr. Hawes' claim and thus went on to accord "presumptive weight" to the medical report issued by Dr. Joyce.

However, Judge Lowther then went on to find that, based upon the fact that Drs. Powell and Houser were well-qualified pulmonary specialists and the fact that both of these physicians had had the actual opportunity to conduct a complete examination of Mr. Hawes, as well as review his x-ray (none of the other physicians involved in the case had conducted complete examinations), the opinions of these two physicians (both of whom found coal workers' pneumoconiosis to be present) overcame the "presumptive weight" of the "negative" finding of the disease by Dr. Joyce and thus found Mr. Hawes to be entitled to retraining incentive benefits.

This Opinion and Award of Judge Lowther was appealed by the employer to the Workers' Compensation Board, and there was no cross-appeal by or on behalf of Mr. Hawes. The Board, after the submission of briefs by the parties and the holding of oral arguments, entered an Opinion on February 2, 1998, upholding Judge Lowther's awarding of retraining incentive benefits to Mr. Hawes.

On November 13, 1996, Eddie L. Bealmear filed an Application for Adjustment of Claim with the Department of Workers' Claims. As was the situation with Mr. Hawes, Mr. Bealmear was seeking benefits as a result of the alleged contraction of coal workers' pneumoconiosis resulting from his years of work in the coal mining industry, with his last date of work in that industry being September 5, 1995.

In support of his claim for benefits, Mr. Bealmear submitted medical reports from Dr. William Houser, who conducted an examination and reviewed a chest x-ray of him on November 29, 1993, and found evidence of category 1/0 coal workers' pneumoconiosis, and from Dr. Robert Powell, who reviewed a September 10, 1996 chest x-ray and found evidence of category 1/0 coal workers' pneumoconiosis.

The employer submitted a medical report as evidence from Dr. Ballard Wright, who reviewed the same September 10, 1996 x-ray that had been reviewed by Dr. Powell and found no evidence of coal workers' pneumoconiosis.

A final medical report was submitted as evidence in the claim, this medical report coming from Dr. Richard Goldwin. Dr. Goldwin had been appointed by the Department of Workers' Claims as the "designated evaluator" pursuant to KRS 342.315 (as amended on December 12, 1996), and based upon his taking and review of a chest x-ray on March 11, 1997, found that x-ray to be completely negative for the presence of coal workers' pneumoconiosis. As reflected by the Department of Workers' Claims files, Dr. Goldwin is a B-reader of chest films.

In an Opinion rendered on September 15, 1997, and after having reviewed and discussed all of the medical evidence, Judge Lowther first determined that the "presumptive weight" language of KRS 342.315, as amended in December 1996, was a procedural (remedial) change in the Act and thus was applicable to the report issued by Dr. Goldwin even though Mr. Bealmear's last work in the coal mining industry had taken place prior to December 12, 1996. Judge Lowther then went on to find that, based upon the fact that Drs. Powell and Houser were well-qualified pulmonary specialists and the fact that Dr. Houser was the only physician involved in the claim who had the actual opportunity to examine Mr. Bealmear as well as review his x-ray, the reports of these two physicians (who found the disease to be present) overcame the "presumptive weight" accorded the opinion of Dr. Goldwin (who found no evidence of the disease) and thus awarded Mr. Bealmear retraining incentive benefits.

This Opinion and Award of benefits by Judge Lowther was appealed by Peabody Coal Company to the Workers' Compensation Board in September 1997. There was no cross-appeal filed and/or submitted on behalf of Mr. Bealmear. Following the submission of briefs

> by the parties and the holding of oral arguments in a related case, the Workers' Compensation Board, by an Opinion entered on February 2, 1998, affirmed Judge Lowther's awarding of retraining incentive benefits to Mr. Bealmear.

The primary issue on appeal is the effect of KRS 342.315 which gives "presumptive weight" to the reports of designated "medical evaluators" appointed to examine claimants in Workers' Compensation cases. Appellant asserts that the Administrative Law Judge was correct in finding that the amendment to the statute was remedial and therefore applicable to all claims filed and/or pending on the effective date of that amendment. The Board found that the change was substantive in nature, and therefore not applicable retroactively to claims already pending on the date of the amendment, including the present claims.

The Board also found, however, that the ALJ had used the wrong standard in assessing the evidence in the Hawes case, but that the ALJ had grounds to disregard the report of the designated evaluator. In Bealmear, the Board found no evidence to overcome the weight to be given the evaluator. Because the amendment was not retroactive, however, the Board affirmed the decision of the ALJ granting benefits in each case.

The employer now appeals, first asserting that the claimants cannot take advantage of the Board's decision that the amendment was substantive and therefore not retroactive, because they did not file cross-appeals from the decision of the ALJ

which found otherwise. The claimants cite us to Wheatley v. Bryant Auto Service, Ky., 860 S.W.2d 767 (1993), for the proposition that a mistake of law is cognizable at any time under the reopening statute, even if no appeal was taken from the erroneous ruling during the statutory period. That being so, they argue, it serves judicial economy for this court to go ahead and consider the issue. We agree.

This court has recently decided a case[1] which was consolidated with the present two cases before the Workers' Compensation Board; the opinion in that case clearly and correctly sets out the applicable law, and we adopt the reasoning as our own:

> . . . . This Court has concluded that the board correctly interpreted the effect of the new provision and correctly found that it should not be applied retroactively.
>
> The clear language of the statute reveals that the presumptive weight provision is a substantive change, not merely a procedural revision. In general, courts must follow the plain language and meaning of a statute. Lydic v. Lydic, Ky. App., 664 S.W.2d 941, 943 (1983). See also Board of Education of Nelson County v. Lawrence, Ky., 375 S.W.2d 830 (1963). A statutory construction which renders a specific statute meaningless is to be avoided. Transport Motor Express, Inc. v. Finn, Ky., 574 S.W.2d 277, 283 (1978). If there is no statutory definition of a phrase, the statutory terms are to be defined or construed according to common and approved usage of the language. Claude N. Fannin Wholesale Co. v. Thacker, Ky. App., 661 S.W.2d 477 (1983). A reviewing court must

[1]Magic Coal Company v. Fox, No. 1998-CA-000527-WC, rendered January 15, 1999.

avoid an interpretation that varies from the statute's language. Layne v. Newberg, Ky., 841 S.W.2d 181 (1992). When construing a statute, a court must attempt to determine the intent and purpose of the legislature in enacting the provision and in its use of certain language. Reed v. Greene, Ky., 243 S.W.2d 892 (1951). A reviewing body is to presume that the legislature by enacting a statutory provision, did so with some intended purpose. See Reisinger v. Grayhawk Corp., Ky. App., 860 S.W.2d 788 (1993).

In the instant case, the board in much detail determined the meaning and intent of the legislature in enacting the new provision of KRS 342.315(2). We believe the board correctly determined that based on the language of the statute and the history surrounding it, the statute does more than simply change the burden of production. KRS 342.315(2) provides,

> The physicians and institutions performing evaluations pursuant to this section shall render reports encompassing their findings and opinions in the form prescribed by the commissioner. The clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by arbitrators and administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. When arbitrators or administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.

The particular language used by the legislature shows that it is clear that the presumption applies to the level of credibility to be given to certain evidence rather than a presumption on an overall issue in the claim. As the board correctly pointed out, if the party claiming benefits cannot

come up with evidence to rebut the finding of the university evaluator which is adverse to him or her, then the party loses.

. . . .

We must now consider whether the presumption in KRS 342.315(2) should be applied retroactively to cases arising before enactment of the new statute. KRS 342.0015 states,

> The substantive provisions of 1996 (1st Extra. Sess.) Ky. Acts Ch. 1 shall apply to any claim arising from an injury or last exposure to the hazards of an occupational disease occurring on or after December 12, 1996. Procedural provisions of 1996 (1st Extra. Sess.) Ky. Acts Ch. 1 shall apply to all claims irrespective of the date of injury or last exposure, including, but not exclusively, the mechanisms by which claims are decided and workers are referred for medical evaluations.

Generally, the assignment of the burden of proof is a rule of substantive law. Director, Office of Workers' Compensation Programs, Dept. Of Labor v. Greenwich Collieries, 512 U.S. 267, [271,] 114 S.Ct. 2251, 2254, 129 L.Ed.2d 221[, 227] (1994)[(citation omitted)]. Further, matters have been considered substantive in part where they are outcome determinative. Fite & Warmath Const. Co. v. MYS Corp., Ky., 559 S.W.2d 729, 733 (1977), citing Erie Railroad Co. V. [sic] Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 1188 (1938).

In the instant case, the provision of KRS 342.314(2) regarding presumptive weight is substantive. It states that the clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by arbitrators and administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. Thus, by the

> plain terms of the statute, it has substantive impact on the case as it changes the burden and level of proof that the party who did not receive a favorable finding from the evaluator must meet. By the terms of KRS 342.0015, substantive provisions of the 1996 special session apply only to claims arising from an injury or last exposure occurring on or after December 12, 1996.

Having found that the presumptive weight provision does not apply to the present cases, we need not reach the question of whether the evidence produced by the claimants overcame that presumption, or whether the Board erred in making such a finding.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William P. Swain
Philip J. Reverman, Jr.
John C. Talbott
Louisville, Kentucky

BRIEF FOR APPELLEE
EDDIE BEALMEAR:

Harry R. Hinton
Madisonville, Kentucky

BRIEF FOR APPELLEE
BILLY GENE HAWES:

A. V. Conway, II
Hartford, Kentucky