RENDERED: December 10, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002608-WC

DOUBLE N COAL COMPANY — APPELLANT

ON PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-01722

v.

WILLIAM BUELL CRAFT; SPECIAL FUND;
JOHN B. COLEMAN,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION AFFIRMING

* *

BEFORE: GUDGEL, CHIEF JUDGE; BUCKINGHAM and KNOX, Judges.

BUCKINGHAM, JUDGE. Double N Coal Company ("Double N") petitions for review of an opinion of the Workers' Compensation Board ("the board") affirming the opinion of the administrative law judge ("ALJ"), which awarded William Buell Craft retraining incentive benefits ("RIB") of $142.50 per week for 208 weeks based upon a finding that Craft has coal workers' pneumoconiosis category 1/1. We affirm.

Double N first argues that the ALJ's finding that Craft gave due and timely notice to Double N is not supported by

substantial evidence in the record.[1] Kentucky Revised Statute (KRS) 342.316(2) requires an occupational disease claimant to give his employer notice of his claim "as soon as practicable after [he] first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted the disease, or a diagnosis of the disease is first communicated to him, whichever shall first occur." KRS 342.135 provides in part that notice "shall be considered properly given and served when deposited in the mail in a registered letter or package properly stamped and addressed to the person to whom notice is to be given . . . ."

Craft was diagnosed with pneumoconiosis on December 18, 1995. He testified that the notice letter was sent to Double N on December 20, 1995. In his Order on Reconsideration, the ALJ concluded:

> As to the issue of notice, I resolve it favorably to [Craft]. In doing so, I rely upon [Craft's] testimony that he had his attorney send a letter to Double N. Mining, informing them that he had been diagnosed as having black lung. I believe [Craft's] testimony that the letter was dated December 20, 1995."

The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, Ky., 862 S.W.2d 308, 309 (1993); Paramount Foods, Inc.

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[1] As Craft prevailed on his claim, Double N must demonstrate that the decision of the ALJ and the board was not supported by substantial evidence. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984).

v. Burkhardt, Ky., 695 S.W.2d 418 (1985). We conclude that the testimony of Craft is substantial evidence in the record to support the ALJ's decision that Craft gave proper notice to Double N of his occupational disease claim.

Double N also asserts that Craft's testimony concerning notice was inadmissible hearsay. The testimony in this regard was as follows:

> Q112 Did you or your attorney notify Double N that you have been diagnosed as having black lung?
>
> A Yes.
>
> Q113 Did you do that or did the attorney?
>
> A No, my attorney did. I told him that...
>
> Q114 By letter?
>
> A Yes sir.
>
> MR. CHANDLER: We attached a copy to the application, Barry.
>
> MR. LEWIS: Okay, what is the date of the notice letter?
>
> A December the 20th '95.

We note first that Double N never objected to the testimony as being hearsay and apparently never raised this argument until its petition to this court. See Wolfe v. Fidelity & Casualty Ins. Co. of N.Y., Ky. App., 979 S.W.2d 118, 120 (1998). Second, the testimony is not clearly hearsay. For these reasons, we are not compelled to reverse the trial court on this issue.

Double N's second argument is that the ALJ's finding that Craft has pneumoconiosis is clearly erroneous on the basis

of the reliable, probative, and material evidence contained in the record. There was conflicting evidence as to whether Craft has pneumoconiosis. However, Dr. John E. Myers diagnosed Craft with category 1/1 pneumoconiosis.

"[T]he function of the Court of Appeals in reviewing decisions of the Workers' Compensation Board is to correct the Board only when we perceive that the Board has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice." Daniel v. Armco Steel Company, L.P., Ky. App., 913 S.W.2d 797, 797-798 (1995); Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992). Where the medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ. Square D, 862 S.W.2d at 309; Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123, 124 (1977). Although we may have chosen to believe the other experts, it was the ALJ's prerogative to accept Dr. Myers testimony, Pruitt, supra, and we are not at liberty to second-guess his decision.[2]

Double N. Mining's final argument is that the December 12, 1996, amendments to KRS 342.315(2) and KRS 342.732(1)(a) are remedial and retroactive and therefore applicable to Craft's claim for RIB, which arose before the effective date of the amendments but was filed on July 31, 1997. The December 1996 amendments to KRS 342.315(3) and KRS 342.315(1) provide for the

[2] As we mention below, however, the 1996 amendments to the workers' compensation statute have changed the law such that an evaluator is now appointed by the court to render an opinion which is to be given presumptive weight.

appointment of a designated occupational disease evaluator from one of the Kentucky medical schools, and KRS 342.315(2), as amended, provides that "[t]he 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." The December 1996 amendments to KRS 342.732(1)(a) changed pneumoconiosis RIB law to provide, among other things, that a RIB recipient could receive RIB payments only while enrolled in a retraining program. KRS 342.0015 provides that

> [t]he 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. The provisions of KRS 342.120(3), 342.125(8), 342.213(2)(e), 342.265, 342.270(7), 342.320, 342.610(3), 342.760(4), and 342.990(11) are remedial.

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, 114 S.Ct. 2251, 2254, 129 L.Ed.2d 221 (1994). Further, matters have been considered substantive in part where they are outcome determinative. Fite & Warmath Construction Company v. MYS Corporation, Ky., 559 S.W.2d 729, 733 (1977), citing Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817,

82 L.Ed. 1188 (1938). We conclude that the amendments to KRS 342.315 are substantive provisions and, therefore, are not applicable to Craft's claim.

Concerning the December 1996 amendments to KRS 342.732(1)(a), that statute was amended to provide that "benefits shall be paid only while the employee is enrolled and actively and successfully participating as a full-time student taking twenty-four (24) or more instruction hours per week in a bona fide training or education program . . . ." This is not one of the statutes listed in KRS 342.0015 as being remedial. Further, KRS 446.080(3) provides that "[n]o statute shall be construed to be retroactive, unless expressly so declared." We thus hold that the 1996 amendment to KRS 342.732(1)(a) does not apply to Craft's claim.

The opinion of the Board is affirmed.

ALL CONCUR.

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