

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000988-WC

KEM COAL COMPANY

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-008747

WINFORD CORNETT;
MILLER BROTHERS COAL COMPANY;
SPECIAL FUND;
HONORABLE RICHARD H. CAMPBELL, JR.,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, McANULTY AND MILLER, JUDGES.

McANULTY, JUDGE: This is a petition for review of the Workers' Compensation Board ("Board") opinion which affirmed the decision of the Administrative Law Judge ("ALJ") finding that Appellee Winford Cornett ("Cornett") was entitled to recover benefits for pneumoconiosis and that Appellant Kem Coal Company ("Kem Coal") was the employer with whom Cornett was last injuriously exposed to coal dust. Kem Coal asserts two arguments on appeal: that the 1996 amended version of KRS 342.732(1)(d) mandates that the claim

be dismissed and that the ALJ erred in finding that Kem Coal, rather than Appellee Miller Brothers Coal Company ("Miller Bros.") was the employer with whom Cornett was last injuriously exposed to coal dust.

Cornett worked in the coal mining industry for over twenty years. He worked for Kem Coal for 16 ½ years before being laid off. Kem Coal has stipulated that while employed there, Cornett was injuriously exposed to coal dust. In December 1995, after he was laid off, Cornett had a physical exam. The chest x-ray indicated that he had profusions in his lungs, category 2 / 3. Cornett worked for another company for six months until Miller Bros hired him.

The evidence presented to the ALJ consisted of Cornett's testimony through deposition and the opinions of physicians. In its assertion that Cornett was injuriously exposed while employed at Miller Bros, Kem Coal points to the testimony of Cornett that he operated a dozer, operated a loader and drove a rock truck for Miller Bros and that although the cabs were air conditioned, he would sometimes open the window in the summer to cool off the cab if the air was not functioning properly. Cornett also stated that his clothes would be black with dust at the end of his shift, as would a cloth he used to wipe out the cab of his dozer at the end of each shift.

Miller Bros presented the opinions and reports of Drs. Abdul Dahhan and Jerome Wiot. Dr. Dahhan opined in his report that, in light of Cornett's deposition, Dr. Dahhan did not believe that Cornett was injuriously exposed to coal dust while

working at Miller Bros. Conversely, Cornett offered the opinion of Dr. Judah L. Skolnick who stated that it was possible that the conditions at Miller Bros. contributed to his pneumoconiosis.

The ALJ, citing Dupree v. Kentucky Dept. Of Mines and Minerals, Ky., 835 S.W.2d 887 (1992), found that "the testimony that plaintiff offered about his exposure to coal dust while employed by the defendant Miller causes one to question the extent to which he was so exposed," therefore, that he was injuriously exposed to coal dust at Miller Bros. must be supported by medical evidence. The ALJ further concluded that Dr. Skolnick couched an opinion in terms of possibility whereas Dr. Dahhan affirmatively stated that Cornett's exposure to coal dust at Miller Bros. could not be considered injurious. The ALJ therefore accepted the report of Dr. Dahhan.

In its review of the decision, the Board held that the ALJ "performed the proper analysis and correctly applied the law and judicial precedent in reaching the determination that Cornett's exposure at Miller was not an injurious exposure." The duty before us is to determine whether the Board has committed an error in assessing the evidence so flagrant as to cause a gross injustice or has overlooked or misconstrued controlling statutes or precedent. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

Kem Coal asserts that the ALJ and Board erred in assessing the evidence regarding Cornett's last injurious exposure to coal dust. Specifically, Kem Coal points to the fact that Dr. Dahhan had the benefit only of Cornett's first

deposition and not his second in determining his injurious exposure. Kem Coal asserts that Cornett went into greater detail in his second deposition, stating that he was exposed to coal dust on a daily basis at Miller Bros.

The Board addressed this contention in its opinion, stating that the evidence before the ALJ was sufficient for the fact finder to conclude that Cornett's exposure to the coal dust was inconsistent, intermittent or of a level that causes one to question the extent to which he was subjected to coal dust. Moreover, the Board stated that the mere fact that Dr. Dahhan relied solely on Cornett's first deposition "does not render his opinion lacking in probative value." We agree with the Board that the ALJ, as fact finder, could properly rely on the report of Dr. Dahhan rather than that of Dr. Skolnick.

Kem Coal submitted additional authority, after the briefs were filed, consisting of a recently issued Supreme Court opinion, Begley v. Mountain Top, Inc., Ky., 968 S.W.2d 91 (1998). This case held that the last employer at which a claimant is injuriously exposed is properly held responsible for payment of the claimant's occupational disability benefits. Because we have found that the Board correctly found no error in the ALJ's determination that Cornett was not injuriously exposed while employed by Miller Bros, Begley does not change the outcome of this case.

The next issue on appeal is whether the 1996 amendments to KRS 342.732 apply to this claim. If they do apply, this claim would be dismissed. Kem Coal relies on this Court's decision in

Colonial Coal Co. v. Breeding, No. 97-CA-584-WC, in asserting that the 1996 amendments apply. In that decision, a panel of this Court held that the amendments of the statute which address the retraining incentive benefits (RIB) are retroactive. Nevertheless, while the appeal has been pending in the case *sub judice*, the Supreme Court expressly overruled this decision in Breeding v. Colonial Coal Co., Ky., 975 S.W.2d 914 (1998). Moreover, we would agree with the Board's decision that Breeding is not controlling, in that it specifically addressed the amendments of the portion of the statute which governs RIB benefits and not income benefits as we have in this case.

In the absence of controlling case law, we look to KRS 342.0015 for guidance in determining whether the 1996 amendments to KRS 342.732 are to be retroactively applied to this claim.

KRS 342.0015 provides as follows:

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. 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.

Cornett has testified that his last day of employment with Kem Coal was November 27, 1995. He further stated that he worked for Miller Bros from June 20, 1996 to December 7, 1996. According to the clear language of the statute, the substantive

provisions of the 1996 amendments do not apply to this claim because the evidence indicates that Cornett's last injurious exposure to coal dust was prior to December 12, 1996.

Therefore, we cannot agree with Kem Coal that the Board erred in finding that the 1996 amendments were inapplicable to this claim.

Accordingly, the decision of the Workers' Compensation Board is affirmed.

BUCKINGHAM, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS IN RESULT ONLY.

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