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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000748-WC

SHADE TREE TRUCKING, INC. — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-08845

EDDIE DEAN DAVIDSON; ROBERT L. WHITAKER, DIRECTOR OF SPECIAL FUND; RONALD W. MAY, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING
** ** ** ** **

BEFORE: BARBER, HUDDLESTON AND JOHNSON, JUDGES.

BARBER, Judge: The Appellee, Eddie Dean Davidson, plaintiff below filed a claim for retraining incentive benefits on December 10, 1996 against Shade Tree Trucking. Davidson began working as a coal truck driver for Shade Tree on August 1, 1996. His last exposure was September 9, 1996. On the morning of September 12, 1996, while still at home, Davidson had a stroke; he had a second stroke the following day and has not returned to work. Shade Tree resisted the RIB claim on grounds that there was no injurious exposure and that Davidson did not have pneumoconiosis.

Davidson's deposition was taken on May 29, 1997. His wife, Joyce Davidson, had to assist verbally due to the effects of the strokes. Joyce Davidson is the president of Shade Tree Trucking, a corporation formed August 1, 1996. Davidson owned the truck and leased it to Shade Tree Trucking. Shade Tree paid Davidson a salary of $500.00 a week to drive it. Mrs. Davidson explained that her husband drove an eighteen-wheel coal truck over what she termed "pretty much short distance," during his six weeks of employment at Shade Tree.

The haul was from a surface mine in Hazard to East Bernstadt, and from a tipple at East Bernstadt to Louisville, where the coal was dumped into a hopper at a concrete plant. Employees of the surface mine and tipple loaded the coal for Davidson. Prior to driving for Shade Tree, Davidson was a self-employed coal truck driver for 22 to 23 years. He had previously filed a RIB claim against Eddie Davidson Trucking, which he voluntarily dismissed. Mrs. Davidson explained that they dropped the case because Davidson wasn't ready to leave the coal fields at that time. Records from that claim, Eddie Dean Davidson v. Davidson Trucking, No. 94-15581, were filed by notice in this claim. A response filed on behalf of the carrier, Wausau Insurance Company, served June 15, 1994, states that there was no coverage because Davidson was the sole proprietor of Davidson Trucking and had not elected coverage for himself.

On June 2, 1997, Davidson filed a motion to amend his Form 103 (RIB claim) against Shade Tree to a Form 102 (claim for occupational disease) alleging that he had been diagnosed with

Stage II pneumoconiosis and that he had spirometry results below total disability standards.

Plaintiff's proof consisted of the reports of John E. Myers, M.D. and N. K. Burki, M.D. Dr. Myers' report reflects that he examined Davidson on May 23, 1997, at the request of his attorney. History indicates that Davidson stopped work on September 2, 1996, when he had a stroke; further, that Davidson is currently drawing Social Security disability, and is still receiving therapy for his stroke. Davidson was noted to be paralyzed on the right side of his body. Dr. Myers reported that Davidson had an employment history of 23 years in the trucking business driving coal trucks; that Davidson had worked "last and longest" with Shade Tree Trucking, and had loaded and unloaded the truck himself.[1] Dr. Myers interpreted a 5/23/97 chest x-ray as Category 2/1-q/r, both mid and lower lung zones; cardiomegaly was noted. The film was Grade 2 due to obesity. Dr. Myers interpreted a chest x-ray from Christian Health Care Services as Category 2/1-q/r both mid and lower lung zones. That film was Grade 2 due to dark apices. High performance values on spirometric testing were FVC at 2.85L or 58% of predicted and FEV1 at 1.95L or 50% of predicted. A notation reflects that the studies were invalid; accurate measurements could not be obtained for height and weight due to plaintiff being unstable on the scales. Dr. Myers diagnosed: (1) Coal workers' pneumoconiosis, Category 2/1-q/r, both mid and lower lung zones, Class III; (2)

[1]This history is contradicted by the history related in Davidson's deposition.

Hypertensive cardiovascular disease; (3) Non-insulin dependent diabetes mellitus; (4) Status post cerebrovascular accident with right hemiparesis and aphasia; and (5) Morbid Obesity. Dr. Myers attributed the diagnosis of coal workers' pneumoconiosis to chronic dust exposure and indicated that any pulmonary impairment was due to exposure to coal dust.

Davidson also filed the report of Dr. N. K. Burki, the university evaluator, whose deposition was taken upon cross examination on October 9, 1997. Dr. Burki is a Board certified internist with a subspecialty Board certification in pulmonary medicine. Dr. Burki's report reflects that pulmonary function studies were invalid, and that further tests were not possible due to the effects of the stroke. Dr. Burki could not ascertain causation in the presence of the cerebral vascular accident. A chest x-ray interpreted by Dr. Lieber, 3/18/97, was classified as Category 2/1, r/q. The radiologist noted an enlarged heart and possible congestive failure, as well.

On cross examination, Dr. Burki agreed that there is a low incidence of the development of coal workers' pneumoconiosis in truck drivers. According to Dr. Burki, a large number of conditions not related to coal dust exposure can cause abnormalities on chest x-ray, including congestive heart failure. Congestive heart failure occurs when the heart does not perform normally, and fluid backs up into the lungs. Dr. Burki agreed that it was unusual for simple coal workers' pneumoconiosis to manifest itself on chest x-ray with primary r shaped opacities. He thought it was "certainly a possibility" that x-ray

abnormalities could be secondary to congestive heart failure rather than to Category 2/1 coal workers' pneumoconiosis.

Dr. Robert Powell, a "B" reader, Board certified in pulmonary medicine, testified by deposition on October 6, 1997. Dr. Powell did not believe that Davidson had had an injurious exposure at Shade Tree. Dr. Powell did not believe that the work Mr. Davidson had performed at Shade Tree would constitute an injurious exposure to coal mine dust of sufficient magnitude to result in the development of coal workers' pneumoconiosis in a susceptible individual, even if continued indefinitely. Dr. Powell explained that the work was described as hauling coal over the road, with the only exposure to coal dust being that while being loaded at the mine site or tipple and unloaded at the tipple or the ultimate destination.

Dr. Dahhan, a Board certified internist with a sub-specialty certification in pulmonary medicine, testified by deposition on October 13, 1997. Dr. Dahhan concluded that based upon his tests and review of medical data, Davidson had no primary coal-induced lung disease. Dr. Dahhan explained that Davidson's lung abnormality resulted *from other causes*, including congestive heart failure. Davidson presented with congestive heart failure on exam. Dr. Dahhan noted that there was also the possibility that Davidson had sarcoidosis, as suggested by Dr. Dineen. Dr. Dahhan explained that sarcoidosis is a granulatomous disease, the cause of which is unknown, and that it is not related to the inhalation of coal mine dust. Davidson was unable

to perform valid pulmonary function studies due to the effects of the stroke.

The Special Fund filed Dr. Dineen's records. Dr. Dineen had apparently seen Mr. Davidson in June, 1996 at the Lexington Clinic, two months before he started driving for Shade Tree. The history related to Dr. Dineen was that Davidson had been told he had first stage black lung disease a year ago. Davidson related that his truck was equipped with a cab and an air conditioning unit; that he had to tarp his own truck, but that the tarp was rolled on with a crank; that he hauled one to three loads a day, and that he off loaded the truck by operating a lever from inside the cab.

Dr. Dineen's examination revealed blood pressure of 150/90; weight 316 pounds. CT scan of the chest showed extensive interstitial pulmonary fibrosis involving all lobes of the lungs; the infiltrate did not have the nodular appearance characteristic of coal workers' pneumoconiosis/silicosis on the high resolution cuts of the CT scan. Dr. Dineen's clinical impression was that Davidson had sarcoidosis resulting in interstitial lung disease. Dr. Dineen did not think that the interstitial lung disease was coal workers' pneumoconiosis.

At a June 23, 1998 pre-hearing conference, the contested issues were identified and included: Whether plaintiff suffers from coal workers' pneumoconiosis and if so, the appropriate tier of benefits under KRS 342.732; whether plaintiff was injuriously exposed with defendant; and whether plaintiff's last exposure was with the defendant.

The Administrative Law Judge's Opinion and Order was rendered on September 3, 1998. The Administrative Law Judge dismissed the case on the grounds that Davidson's work at Shade Tree did not constitute an injurious exposure:

> Although the evidence is persuasive that plaintiff has some degree of pneumoconiosis resulting from his more than 20 years of work around the coal industry, the evidence is also persuasive that a significant portion of the changes seen on x-rays are the result of disease processes having nothing whatsoever to do with coal mining work. However, this case need not depend on any effort by the ALJ to unscramble that egg. One of plaintiff's coal hauls was from East Bernstadt, Kentucky to Hazard, Kentucky. East Bernstadt is located north of London, Kentucky and the round trip mileage is ... approximately 118 miles. Another of plaintiff's coal hauls was from East Bernstadt, Kentucky to Louisville ... and the round trip is 300 miles. It is apparently from those milages [sic] that very little of plaintiff's work was spent around any coal mine or loading point and the great majority of his work was spent driving a truck on paved highways. Based upon that evidence, **and the evidence of Dr. Powell the ALJ is persuaded that plaintiff did not sustain an injurious exposure while employed by the defendant-employer, Shade Tree Trucking. Accordingly, plaintiff's application will be dismissed.** [Emphasis added.]

Davidson appealed to the Workers' Compensation Board and contended that the only evidence concerning plaintiff's exposure came from his wife, and that her testimony was uncontradicted and must stand. The Board, in a 2-1 decision, reversed, but on other grounds. The Board explained that "in the instant claim the ALJ concluded that although Davidson has some degree of coal workers' pneumoconiosis as a result of his 20-plus

years driving a coal truck, his exposure while at Shade Tree was not injurious." The Board determined that the Administrative Law Judge had taken judicial notice of Davidson's routes and mileage. The Board reviewed the rules of evidence pertaining to judicial notice, KRE 201, and concluded that since the Administrative Law Judge elected to take judicial notice of the facts after the close of evidence without notice to the parties, "we must view Davidson's appeal as a constructive request to be heard with regard to those facts judicially notice by the Administrative Law Judge." The Board remanded the case to the Administrative Law Judge with instruction that proof time be reopened and that the parties be permitted a reasonable time to submit additional evidence with regard to those matters judicially noticed.

Shade Tree filed a Petition for Review with this Court on April 6, 1999, contending that the Board exceeded its scope of review in reversing the Administrative Law Judge. We agree and reverse the Board. We cannot improve upon the summarization of the fact finder's authority and the scope of review contained in Snawder v. Stice, Ky. App., 576 S.W.2d 276, 279-280 (1979):

> The claimant in a workman's compensation case has the burden of proof and the risk of persuading the ...[factfinder] in his favor. Tackett v. Sizemore Mining Company, Ky., 560 S.W.2d 17 (1977); Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977); Hudson v. Owens, Ky., 439 S.W.2d 565 (1969); Lee v. International Harvester Company, Ky., 373 S.W.2d 418 (1963); Columbus Mining Company v. Childers, Ky., 265 S.W.2d 443 (1954). There is a vast difference between what the ..[factfinder] is free to do and what it can be forced to do under a given state of evidence. Cavin v. Lake Construction Company, Ky., 451 S.W.2d 159 (1970). There are some cases in which no

> evidence whatever is required in "support" of a negative finding, and among them are those in which the claimant's evidence would justify a favorable finding but would not require one as a matter of law. Lee v. International Harvester Company, supra, 373 S.W. 2d at 420. If the ...[factfinder] finds against a claimant who had the burden of proof and the risk of persuasion, the court upon review is confined to determining whether or not the total evidence was so strong as to compel a finding in claimant's favor. Hudson v. Owens, supra, 439 S.W.2d at 570; See also, Inland Steel Company v. Johnson, Ky., 439 S.W.2d 562 (1969); Kentland Elkhorn Coal Company v. Johnson, Ky. App., 549 S.W.2d 308 (1977).
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> Where there is conflicting medical testimony, the ...[factfinder] has the right to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof. See Caudill vs. Maloney's Discount Stores, supra, 560 S.W.2d at 16; see also McCloud v. Beth-Elkhorn Corporation, Ky., 514 S.W.2d 46 (1974); Wells v. Kentucky Appalachian Industries, Inc., supra; Tackett v. Eastern Coal Corporation, 295 Ky. 422, 174 S.W.2d 707 (1943).

We may have reached a different result if we were the factfinder, but the Administrative Law Judge found against the claimant who had the burden of proof and the risk of non-persuasion. The Board, upon review, was limited to a determination of whether or not the evidence compelled a finding in Davidson's favor. "To be compelling, evidence must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ." REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224 91985). In Powell's opinion, Davidson did not have an injurious exposure at Shade Tree. As was his prerogative, the

Administrative Law Judge relied upon Dr. Powell. The evidence did not compel a contrary finding, and the Board exceeded its authority in reversing the Administrative Law Judge. KRS 342.285(2).

Davidson contends that the only testimony concerning the extent of his coal dust exposure came from his wife - that because her testimony was uncontradicted, Davidson sustained his burden of proof. To the contrary, uncontradicted testimony of an interested witness is not binding upon the factfinder:

> 'The general rule in respect to the weight to be accorded uncontradicted testimony is: If the witness is disinterested, and in no way discredited by other evidence, and the testimony is as to a fact not improbable or in conflict with other evidence, and is within his own knowledge, such fact may be taken as conclusive. *But such rule does not necessarily apply, if the uncontradicted evidence is given by interested witnesses ...'* [citation omitted]
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> [In that event the factfinder has] the prerogative ... to remain unpersuaded that the claimant has sustained her burden of persuasion." Grider Hill Dock v. Sloan, Ky. App., 448 S.W.2d 373, 374-375 (1969) [emphasis added].

Even were Mrs. Davidson not an interested witness, lay testimony is not competent on the issue of whether or not a particular exposure is *injurious*. Proof that a particular exposure was of such a magnitude and frequency as would have independently caused the disease requires competent medical evidence. Dupree v. Kentucky Department of Mines & Minerals, Ky., 835 S.W.2d 887 (1992).

The Board disregarded the fact that the Administrative Law Judge based his decision [that there was no injurious exposure at Shade Tree] upon competent medical evidence, specifically Dr. Powell's opinion. Instead, the Board focused upon the Administrative Law Judge's apparent judicial notice of the distances Davidson traveled. Geography and distance are judicially noticed. Brandiff v. Commonwealth, 227 Ky. 389, 13 S.W.2d 273 (1929). Even if the Administrative Law Judge's reference to Davidson's hauls were in error, [which we do not decide], it was harmless error.

The personal or private knowledge of a judge cannot form the basis for a finding of fact or decision of the case. Except for matters which may be judicially noticed, the record must supply the facts that govern a result; however, where there is competent evidence of record to support the judge's findings and conclusions, error made by reference to a judge's individual knowledge is not prejudicial. Wyatt v. Webb, Ky., 317 S.W.2d 883 (1958). It is well settled that the findings of an administrative agency will be upheld despite its partial reliance upon incompetent evidence, if it also had before it competent evidence which by itself would have been legally sufficient to support the findings. Big Sandy Community Action Program v. Chaffins, Ky., 502 S.W.2d 526, 530 (1973).

Accordingly, we reverse the Opinion of the Workers' Compensation Board and the decision of the Administrative Law Judge is reinstated.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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