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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001774-WC

VICTORY PROCESSING COMPANY, INC. — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-08828

WILLIAM B. GAMBLIN, SR.; ISLAND CREEK COAL COMPANY, INC.; HON. JOHN B. COLEMAN, Administrative Law Judge; SPECIAL FUND; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, COMBS, and McANULTY, Judges.

COMBS, JUDGE: The appellant, Victory Processing Company, Inc. (Victory), appeals from the decision of the Workers' Compensation Board (Board) affirming the opinion and order of the Administrative Law Judge (ALJ). The ALJ awarded the appellee, William B. Gamblin, Sr. (Gamblin), workers' compensation benefits and held that Victory was the employer liable for payment of those benefits. Having carefully reviewed the record on appeal, we find no error and affirm the judgment of the Board.

Gamblin worked in the coal mining industry from 1965 to 1996. His first job was with Five Star Coal Company as an underground laborer; he held this job for approximately eleven months. Gamblin next worked for Island Creek Coal Company (Island Creek). While at Island Creek, Gamblin worked as a pinner, a shuttle car operator, truck driver, and a greaser. He was employed by Island Creek from 1966 to December 1993. After his employment with Island Creek ended, Gamblin remained unemployed for approximately two years during which time he filed a claim for Retraining Incentive Benefits (RIB) against Island Creek. However, he voluntarily agreed to dismiss his RIB claim against Island Creek when he started working for Victory in January 1995. At Victory, Gamblin drove a dump truck, operated a grader, and drove a water truck. He was employed by Victory until February 1996, when he was laid off from work. Gamblin has not worked since the lay-off.

In December 1996, Gamblin refiled his claim for RIB benefits, naming both Victory and Island Creek as the responsible employers. Subsequently, the Arbitrator who reviewed his claim rendered a benefit review determination, finding that he was entitled to a RIB award. The Arbitrator determined Island Creek to be the employer responsible for payment of Gamblin's benefits. Island Creek filed a request for hearing before an ALJ. The claim was assigned to an ALJ for review, and on February 26, 1999, the ALJ rendered an opinion, finding that Gamblin had pneumoconiosis, category 1/1, and that he was entitled to a Tier II award. However, the ALJ held that Victory — not Island Creek

— was the employer responsible for payment of benefits since Gamblin's last injurious exposure occurred during his employment with Victory. Accordingly, the ALJ apportioned 75% of the liability to the Special Fund and 25% to Victory. Victory appealed to the Board, which affirmed the ALJ's decision. This appeal followed.

The sole issue raised on appeal is whether the ALJ erred in holding that Victory was the employer liable for payment of Gamblin's benefits. Victory argues that there is insufficient evidence to support that Gamblin's last injurious exposure occurred during his employment at Victory. We disagree.

Pursuant to KRS 342.316(1)(a) and KRS 342.316(10)[1], the employer in whose employment the claimant was last exposed to the hazard of the occupational disease is liable for compensation of the occupational disease. The exposure incurred during the claimant's last employment does not have to be the actual cause of the disease, and there is no minimum time period of exposure that must be met in order for liability to be imposed upon a particular employer. Begley v. Mountain Top, Inc., Ky., 968 S.W.2d 91 (1998).

> [L]iability is based on the character of the exposure, not on its duration and not on whether it was the particular exposure associated with the first diagnosis of the disease or with the progression of the

[1]Gamblin's filed his claim on December 5, 1996, seven days before the effective date of the 1996 legislative amendments to KRS 342. The ALJ held that the 1996 amendment were not applicable and that the version of the relevant statutes in effect at the time of Gamblin's filing his claim were controlling. We agree and have reviewed this case using the pre-1996 version of the applicable statutes.

> disease from one category or degree of respiratory impairment to another.

Id. at 95. The claimant is merely required to prove that the type of exposure he experienced at his employment would have eventually resulted in the contraction of the occupational disease; that is to say, that he incurred an "injurious exposure." KRS 342.011(4) defines injurious exposure to mean exposure to occupational hazard "which would, independently of any other cause whatsoever, produce or cause the disease for which the claim is made."

Additionally, in cases where the claimant's exposure to the hazard of occupational disease is minimal, lay testimony alone is insufficient to prove that the exposure was injurious. Dupree v. Kentucky Department of Mines and Minerals, Ky., 835 S.W.2d 887. Under such circumstance, the claimant must prove injurious exposure through competent medical evidence. However, in cases where the intensity of the exposure to coal dust was relatively constant and did not decrease, it can be inferred from the diagnosis and work history that the last exposure was injurious. Id.

In the case before, it is undisputed that Gamblin was last employed by Victory, where he worked from January 1995 to February 1996 — a fact that satisfies both KRS 342.316(1) and (10) as to Victory's liability — if the additional requirement of injurious exposure during that employment can be shown. Gamblin testified that the dust conditions at Victory were "pretty bad at times" and that he inhaled coal dust as a regular part of his job. Gamblin described the dust as being so thick that at times

it was difficult to see other trucks as they drove by on the site. He explained that there was nothing he could do to avoid breathing the dust. The record shows that Victory was a strip mining operation and that all mining activities were conducted above ground. We agree with the ALJ and Board that the record reflects that Gamblin's exposure to coal dust at Victory was both constant and injurious.

Furthermore, we reject Victory's contention that Dupree v. Kentucky Department of Mines and Minerals, Ky., 835 S.W.2d 887, is applicable and controlling in this case. We believe that under the circumstances of this case, it can be reasonably and fairly inferred that Gamblin's level of exposure at Victory was injurious. We find no error.

We affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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