RENDERED: December 15, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000522-WC

CAROL FECK, APPELLANT
EXECUTRIX ESTATE OF CHARLES E. FECK

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-88-13072

LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT;
SPECIAL FUND AND WORKERS' COMPENSATION BOARD, APPELLEES

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

BEFORE: BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

BARBER, JUDGE: Carol Feck, executrix of the estate of Charles Feck (Mrs. Feck) appeals from a Workers' Compensation Board Opinion affirming the ALJ's dismissal on the ground that her late husband, Charles Feck, had not proven an injurious exposure to asbestos. We affirm. Charles Feck was a firefighter for Lexington Fayette Urban County Government (LFUCG), from 1959 until his retirement on January 5, 1986. Before that, he was a mechanic for Greyhound from 1947 through 1959. Mrs. Feck filed a workers' compensation claim on April 27, 1988, alleging that her

husband had contracted mesothelioma from asbestos exposure at Greyhound and LFUCG. Charles Feck died on July 1, 1987. The claim against Greyhound was ultimately dismissed as untimely filed under KRS 342.316. In an Opinion entered July 12, 1999, the ALJ found that:

> Dr. Frank testified during a second deposition on October 12, 1998, at which time he said there was a growing body of literature on the subject of occupational exposure to asbestos. Based upon more recent studies it was his opinion that Mr. Feck had been occupationally exposed to asbestos as a fireman or fire fighter. He agreed that he had no definitive evidence of any asbestos exposure to Mr. Feck as a fireman but in settings where asbestos would have existed and where many other individuals doing the same occupation get exposure and get the disease it is reasonable to conclude that this occurred to Mr. Feck. There would be no reason to think that Mr. Feck was different from other mechanics or other fire fighters and somehow miraculously escaped an occupational exposure to asbestos.
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> Sanford W. Horstman, CIH, Ph.D., industrial hygienist . . . stated that Mr. Feck's opportunity for exposure to asbestos as a fireman would have been while engaged in overhaul or clean up of a site after a fire. It was Dr. Horstman's opinion that the vast majority of his exposure probably came while working for Greyhound but none-the-less his probable exposure to asbestos while working as a fire fighter for the City of Lexington was a contributing factor in causing his mesothelioma.

The ALJ concluded that "plaintiff went to great lengths to establish that there well may have been occasions when Charles Feck was exposed [to asbestos] as a firefighter but no proof was presented as to the 'conditions' which 'may' have existed. The evidence herein presented falls short of the mark." The ALJ explained that although Dr. Horstman stated that Charles Feck's probable exposure as a firefighter was a "contributing factor";

there was "no evidence presented that Mr. Feck was ever actually exposed [while employed by LFUCG]. . . ."

Mrs. Feck petitioned for reconsideration, contending that under Begley v. Mountain Top Inc., Ky., 968 S.W.2d 91 (1998), she had proven an injurious exposure. The ALJ denied the petition, finding Begley distinguishable upon its facts. Mrs. Feck appealed on behalf of her husband's estate. The Board affirmed, because the evidence failed to prove any asbestos exposure at LFUCG would have caused the disease independently of any other cause if continued for an indefinite period. This appeal followed.

Mrs. Feck relies upon Begley, in support of her argument on appeal. We agree with the ALJ that Begley is distinguishable on its facts. Begley worked 20 years underground. After he was diagnosed with pneumoconiosis and had filed a claim against a previous employer, Begley was hired by Mountain Top. He was laid off a month later. Begley amended his claim to add Mountain Top as a defendant. Begley's exposure to coal dust was consistent throughout his mining career. Mountain Top did not contend that Begley's exposure there was not injurious. At issue was the employer responsible for the payment of benefits. The Supreme Court held that:

> The clear and unambiguous language of KRS 342.316(1)(a) and KRS 342.316(10) places liability for the payment of compensation for occupational disease on the employer in whose employment the employee was last exposed to the hazard of the occupational disease. [citation omitted]. The exposure incurred during a particular employment need not have been the actual cause of the disease in order

> for a causal connection to be established. Rather, all that is required is that the worker present evidence which proves that the type of exposure received during the subject employment **would have** eventually **resulted in contraction of the disease**, in other words, that it was injurious. See KRS 342.0011(4) (emphasis added).

Id. at p. 95.

Mrs. Feck submits that the case law is "somewhat ambiguous" as to whether or not it must be proven that an exposure "would have" resulted in the disease rather than the exposure "could have" resulted in the disease. We cannot agree. Under the statutory scheme in effect at the time of Mr. Feck's alleged last exposure, injurious exposure is defined as one that **would**, independently of any other cause whatsoever, produce or cause the disease for which the claim is made. KRS 342.620(4), now KRS 342.0011(4). Our Supreme Court discussed the evidence necessary to prove an exposure (in the context of single vs. a multiple exposure for apportioning liability between the employer and Special Fund) in Island Creek Coal Co. v. Beale, Ky., 804 S.W.2d 1, 3 (1990):

> There is some dispute as to whether the last employer must show a previous "injurious exposure," KRS 342.620(4), or merely an exposure. . . . Evidence to sustain the issue of exposure to hazards of disease must be of substance and of consequence carrying the quality of proof and having fitness to produce conviction." Rowe v. King-Darby Coals, Inc., Ky., 463 S.W.2d 342, 344 (1971). In Rowe the Court specifically addressed the argument that KRS 342.316(10) (a) [then KRS 342.316 (13)(a)] requires a showing of an "exposure" rather than an "injurious exposure." The Court noted that an injurious exposure is defined by statute as an exposure

> to an occupational hazard which would, independently of any other cause whatsoever, produce or cause the disease. KRS 342.620(4) [now KRS 342.0011(4)] specifically makes applicable that definition to KRS 342.316. Regardless of the fact that the word "injurious" is not included in KRS 342.316(10) (a) "no less showing of exposure is contemplated by KRS 342.316(13)(a) [now (10) (a)] because in each instance there is required to be shown an exposure to the hazard of a disease. [citation omitted]

Mrs. Feck also submits that the ALJ, as fact finder, had to rely on expert testimony to determine causation; further, that Dr. Frank was the only expert qualified to give such an opinion. Thus, Mrs. Feck attempts to persuade us that evidence of an injurious exposure at LFUCG was uncontradicted and binding upon the ALJ. Mrs. Feck's reasoning ignores the fact that the expert opinion was based upon an *assumption* of an exposure there was no evidence presented that Mr. Feck was ever actually exposed to asbestos fibers while employed by the LFUCG.

In Stovall v. Mullen, Ky. App., 674 S.W.2d 526 (1984), the court reversed a determination that the claimant had had an injurious exposure to the hazard of silicosis while working at a brickyard, despite testimony from two physicians that the claimant's exposure to sand and silica dusts could have contributed to his condition. The court held that *there was no evidence in the record to support the assumption* that the claimant was so exposed.

The ALJ, as fact-finder, has the *sole authority* to determine any inferences to be drawn from the evidence. Paramount Foods, Inc.

v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Here, the ALJ was not persuaded that the evidence was sufficient to establish an injurious exposure. Mrs. Feck notes that there was no proof her husband *was not* exposed to asbestos while working at LFCUG; however, no evidence is required to support a negative finding. Workman v. Wesley Manor, Ky., 462 S.W.2d 898 (1971).

The standard of review where the ALJ finds against the party with the burden of proof is whether the evidence would have compelled a contrary finding. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). "The WCB is suppose to decide whether the evidence is sufficient to support a particular finding made by the ALJ, or whether such evidence as there was before the ALJ should be viewed as uncontradicted and compelling a different result. These are judgment calls. No purpose is served by second-guessing such judgment calls,. . . ." Western Baptist v. Kelly, Ky., 827 S.W.2d 685, 687 (1992). The Opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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