

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002576-WC

ARJAY MINING, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-96-96799 & WC-96-07672

RODNEY BAILEY; ROBERT L. WHITTAKER,
DIRECTOR OF SPECIAL FUND; HON. THOMAS
A. DOCKTER, ADMINISTRATIVE LAW
JUDGE; AND WORKERS COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING
** **

BEFORE: BUCKINGHAM, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Arjay Mining, Inc., has filed a petition for review of an opinion of the Workers' Compensation Board entered on September 27, 1999, which reversed the decision of the Administrative Law Judge which had dismissed Rodney Bailey's claim for occupational disability benefits. The primary issue in this case is whether the provision of KRS¹ 342.315(2), which states that the findings and opinion of designated university medical evaluators shall be afforded presumptive weight, should

¹Kentucky Revised Statutes.

be applied retroactively to claims arising prior to the December 1996 amendments to the Kentucky workers' compensation statutes. In light of the Supreme Court of Kentucky's decision in Magic Coal Co. v. Fox,² we reverse and remand this case for further consideration.

The material facts in this case are not in dispute. Bailey was employed in various capacities in numerous underground coal mines, his most recent employment being with Arjay Mining as a foreman/face boss from July 1993 through January 26, 1996. Bailey alleged that he was first injured on August 8, 1995, when he was "shoved into the roof of a three-wheeler injuring his neck and back." Bailey claims a second injury occurred on January 26, 1996, and he has not worked since that date.

In support of his claim for occupational disability benefits from coal workers' pneumoconiosis, Bailey submitted reports from Dr. Glenn R. Baker, a pulmonary specialist, and Dr. Robert W. Powell, a pulmonary specialist. Dr. Baker interpreted a chest x-ray dated August 1, 1996, as positive for category 1/0 pneumoconiosis. Dr. Powell examined Bailey on March 14, 1997. He reported that Bailey "did not give maximal consistent effort" during the pulmonary function testing, and the tests taken were not valid. Dr. Powell's diagnosis of Bailey was that he had "possible category 1/1, Q/P coal worker's pneumoconiosis," and that Bailey was not "physically able, from a pulmonary standpoint, to do his usual coal mine employment or comparable and gainful work[.]"

²Ky., 19 S.W.3d 88 (2000).

On April 14, 1997, at the request of Arjay Mining, Bailey was examined by Dr. Abdul Dahhan, a pulmonary specialist. Dr. Dahhan also reported that "[m]aximal effort was not used" during the pulmonary function studies "resulting in an invalid tracing." Dr. Dahhan's report stated that Bailey "has no respiratory impairment. Overall, he retains the respiratory capacity to continue his previous coal mining work or job of comparable physical demand."

In accordance with KRS 342.315, Bailey was referred to Dr. Richard Goldwin, a Board-certified radiologist from the University of Louisville, who conducted a radiographic examination and diagnosed Bailey with category 0/1 coal workers' pneumoconiosis.

The ALJ issued his opinion on August 4, 1997. He determined that "the 'presumptive weight' attributed to the University x-ray reading must be applied to [Bailey's] claim," and that based upon that requirement, Bailey failed to meet his burden of proof in his claim that he suffered from coal workers' pneumoconiosis.

Bailey appealed to the Board, which ultimately reversed the ALJ and concluded as follows:

We note that KRS 342.0015 provides, in part, that:

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.

We do not believe this language provides that the presumptive weight provisions must also be retroactively applied. Generally, a statute may not be given retroactive effect unless the law expressly so declares. KRS 446.080(3). KRS 342.0015 does not expressly declare that the presumptive weight provisions of KRS 342.315 should be given retroactive effect. We also do not believe that the Legislature's mandate that "mechanisms by which claims are decided and workers are referred for medical evaluations" should be applied retroactively necessarily includes the presumptive weight provisions of KRS 342.315. We do not believe that a substantive change in the burden of proof in a workers' compensation claim can be considered a "mechanism" by which the claim is decided. We believe this language was merely intended by the Legislature to give the ALJs and Arbitrators access to a relatively unbiased opinion by a skilled evaluator but did not intend to affect the substantive rights of those claimants whose claims arose prior to December 12, 1996. Since the presumptive weight provision of KRS 342.315 [was] not in effect on the date of Bailey's last exposure, it was error for the ALJ to apply them in this claim.

This petition for review followed.

Arjay Mining contends that the statutory presumption given to the opinion of a university evaluator pursuant to KRS 342.315(2), as amended effective December 12, 1996, is procedural in nature, and thus applicable to all pending claims even if the last date of exposure occurred prior to the effective date of the amendment.³

³Arjay Mining also claims that the issue of whether KRS 342.315 should be applied retroactively to Bailey's claim was not preserved for review and that the Board sua sponte raised the issue for the first time on administrative appeal. However, since we are deciding this case based on the merits favorable to Arjay Mining, it is not necessary to address the claim of preservation of error, as it becomes a moot point.

While this appeal was pending, our Supreme Court rendered its decision in Magic Coal, supra, and held as follows:

[T]he amendments to KRS 342.315 which became effective on December 12, 1996, apply to all claims pending before the fact-finder on or after that date. KRS 342.315(2) creates a rebuttable presumption which is governed by KRE 301 and, therefore, does not shift the burden of persuasion. Pursuant to KRS 342.315(2), the clinical findings and opinions of the university evaluator constitute substantial evidence of the workers' medical condition which may not be disregarded by the fact-finder unless it is rebutted. Where the clinical findings and opinions of the university evaluator are rebutted, KRS 342.315(2) does not restrict the authority of the fact-finder to weigh the conflicting medical evidence. In instances where a fact finder chooses to disregard the testimony of the university evaluator, a reasonable basis for doing so must be specifically stated.⁴

Accordingly, the opinion of the Workers' Compensation Board is reversed, and this matter is remanded to the ALJ for consideration of the evidence under the Magic Coal standard.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Barry Lewis
Hazard, KY

BRIEF FOR APPELLEE, RODNEY
BAILEY:

Robert B. Bowling
Middlesboro, KY

BRIEF FOR APPELLEE, SPECIAL
FUND:

John Burrell
Frankfort, KY

⁴Id. at 97.