

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-000887-WC

DON NAPIER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-95-17136

WHITAKER COAL CORPORATION;  
ROBERT L. WHITTAKER, DIRECTOR  
OF SPECIAL FUND; HONORABLE DONALD  
G. SMITH, ADMINISTRATIVE LAW  
JUDGE; WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING  
\*\* \*\*

BEFORE: COMBS, DYCHE, AND POTTER, JUDGES<sup>1</sup>.

DYCHE, JUDGE: Don Napier appeals from an opinion of the Workers' Compensation Board ("Board") which affirmed an opinion and award of the Administrative Law Judge ("ALJ") increasing Napier's disability award to 60% on reopening. Napier contends that he is entitled to an award of 100%. We affirm.

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<sup>1</sup>Senior Status Judge John Potter sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5) (b) of the Kentucky Constitution.

All parties agree that Napier's burden on appeal is whether the evidence compels a finding in his favor. *Paramount Foods, Inc. v. Burkhardt*, Ky., 695 S.W.2d 419 (1985). Napier urges us to find that the testimony is uncontradicted, and compels a finding of 100% disability. While we might agree that the testimony presented on his behalf is uncontradicted by the testimony of other witnesses, it is not, in and of itself, sufficient to compel a finding in his favor.

As noted by the ALJ and the Board, neither of Napier's witnesses considered a 1996 back injury caused by a car accident, or a 1994 injury while shoveling. The increases in restrictions were incremental, and neither witness testified directly that Napier was incapable of any regular employment or that there was no employment that he could perform.

In short, while the testimony supported the increase in disability found by the ALJ, it did not compel a finding of total disability.

The opinion of the Workers' Compensation Board is affirmed.

POTTER, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTING: My review of the record compels me to dissent. The claimant fully met his burden of proof. It was simply rejected without any evidentiary basis or justification. I would hold that he has established his entitlement to an award of 100% of benefits and that any other result is both arbitrary and unfounded.

BRIEF FOR APPELLANT:

James D. Holliday  
Hazard, Kentucky

BRIEF FOR APPELLEE WORKERS'  
COMPENSATION BOARD:

Joel D. Zakem  
Frankfort, Kentucky

BRIEF FOR APPELLEE WHITAKER  
COAL CORPORATION:

Charles W. Berger  
Harlan, Kentucky