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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-001509-WC

HIGHLAND MINING & PROCESSING, INC. — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-00681

BRIAN PERKINS; HON. RICHARD M. JOINER, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON, GUIDUGLI, AND VANMETER, JUDGES.

GUIDUGLI, JUDGE: Highlands Mining & Processing, Inc., petitions this Court for review of an opinion of the Workers' Compensation Board reversing and remanding a decision of the Administrative Law Judge. The Board held that liability for a retraining incentive benefits award should rest with Highlands Mining since it was the last employer with whom Brian Perkins worked as of the date his claim was submitted to the consensus procedure. For the reasons stated below, we affirm the Board's opinion.

The facts are not in controversy and are sufficiently detailed in the record. Having closely examined the written arguments, the record and the law, we have concluded that we cannot improve upon the well-written opinion of the Board. In the interest of judicial economy, and as no good purpose would be served in restating the Board's analysis in our own language only to reach the same conclusion, we adopt the Board's opinion as that of this Court. The Board stated in relevant part as follows:

> Perkins has worked as an underground coal miner for more than twenty-two years. He began his employment with Highlands Mining as a miner operator in March 2000, but was laid off on December 12, 2003.
>
> Perkins filed his application for resolution of coal workers' pneumoconiosis claim on April 22, 2004, supported by an x-ray interpretation establishing category 2/1 pneumoconiosis. Highlands Mining submitted radiographic evidence of category 1/1, simple pneumoconiosis. Because there was no party consensus, the x-rays were submitted to a panel of B readers. See KRS 342.316(3)(b)4e. A consensus was reached on September 27, 2004 after two of the three B readers diagnosed category 1/1 coal workers' pneumoconiosis, which absent pulmonary impairment would have qualified Perkins for retraining incentive benefits ("RIB"). See KRS 342.732(1)(a)1.
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> Highlands Mining deposed Perkins on November 16, 2004 and Perkins testified he had returned to work as an underground miner for a different employer. At the time of Perkins's deposition, he had been working for Cumberland Resources as a miner operator

for “just a little over a month.” One week later Highlands Mining filed a motion to dismiss, alleging that since Perkins had returned to work, his last employer is responsible for any and all benefits. Perkins responded to the motion to dismiss. He relied on the holding in National Mines Corp. v. Pitts, 806 S.W.2d 636, 637 (Ky. 1991), which, when decided, stood for the proposition that “[w]here the category 1 disease was present, medical proof was taken and the claim filed before [the claimant] was employed by another mine, there could be no causal connection between the disease that was the subject of the claim and the latter employment.” Perkins also filed a motion to amend his pneumoconiosis claim to allege pulmonary impairment. He filed spirometric test results revealing pulmonary impairment of less than 80% of predicted normal value. The ALJ dismissed Highlands Mining since it was not the last responsible employer and determined Perkins’s motion to amend to allege pulmonary impairment was moot.

Perkins filed a timely petition for reconsideration and the ALJ, reversing his previous decision, granted Perkins’s motion to amend and allege pulmonary impairment. However, by the time the ALJ ruled on Perkins’s petition, he had already appealed to this Board. Perkins therefore moved the Board to remand the matter to the ALJ on the grounds that any appeal would be premature until there was a final ruling on the merits of the case. Perkins noted that counsel for Highlands Mining did not object. In an order dated February 2, 2005, the Board granted Perkins’s motion, dismissed the appeal and remanded the claim to the ALJ.

Thereafter, Perkins renewed his motion to amend his claim to allege pulmonary impairment. Perkins also argued if a RIB award were made, under the authority contained in Pitts, supra, liability would

lie with Highlands Mining, while at the same time arguing pulmonary dysfunction would shift liability to Cumberland Resources. Perkins contended that if the motion to join Cumberland Resources was denied, the BRC could continue as scheduled but if "Cumberland Resources is added as a party defendant, then it should be entitled to the full amount of time for mustering a defense." In a March 2, 2005 order, the ALJ again granted Perkins's motion to amend his claim to allege pulmonary impairment, but overruled his motion to join Cumberland Resources and its insurer as defendants. The ALJ stated "[h]owever, this claim is placed in abeyance until such time as the plaintiff files a Form 102 with attachments to assert any claims he may have against Cumberland Resources Corporation and its insurer . . . ."

On March 14, 2005, Highlands Mining filed a medical report revealing normal spirometric testing and no evidence of functional respiratory impairment. No further action was taken in Perkins's claim until December 16, 2005, when the ALJ directed the parties to provide a status report addressing whether a Form 102 against Cumberland Resources had been filed, and, if not, a recommendation on how to proceed. Highlands Mining requested its dismissal as a party since it was not Perkins's last employer. Highlands Mining further argued that if it could not be dismissed as a party, then the panel x-rays should be released to Highlands Mining for re-reading pursuant to the Kentucky Supreme Court's holding in Hunter Excavating v. Bartrum, 168 S.W.3d 381 (Ky. 2005). Perkins responded noting the pulmonary function testing filed by Highlands Mining revealed both an FVC and FEV1 above 80% of predicted, rendering moot any claim for benefits other than RIB. Perkins contended no meritorious claim could be filed against Cumberland Resources. Perkins continued to argue that subsequent

employment did not shift liability for a RIB award and the claim should continue against Highlands Mining since it was the last employer at the time the claim was filed.

In a March 9, 2006 order, the ALJ stated,

> This case comes before the Administrative Law Judge upon Renewed Motion to Dismiss filed by the Defendant-Employer, Highlands Mining & Processing, Inc., to dismiss it as the last responsible employer in this claim. The Plaintiff testified at his deposition on November 16, 2004, that he is employed by Cumberland Resources running a miner. Plaintiff has been employed as a coal miner for Cumberland Resources after his employment with the defendant Highlands Mining & Processing.
>
> KRS 342.316(1) provides in part:
>
> > The employer liable for compensation for occupational disease shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease.
>
> A claimant cannot receive retraining incentive benefits until he ceases his employment in the severance or processing of coal. KRS 342.732(1)(a)8 provides:
>
> > 8. A claim for retraining incentive benefits provided under this section may be filed, but benefits shall not

> be payable, while an employee is employed in the severance or processing of coal as defined in KRS 342.0011(23).
>
> The Administrative Law Judge being otherwise sufficiently advised, IT IS HEREBY ORDERED that the motion to dismiss is sustained and this case is hereby DISMISSED.

On appeal, Perkins continues to assert National Mines Corp. v. Pitts, supra, is controlling. Highlands Mining contends Pitts was decided during the era in which a RIB award could be paid to a working miner and the right to collect RIB while continuing to be employed in the mining industry played a major role in the court's conclusion that an employer with whom the individual was last exposed at the time of filling [sic] was liable.

Since its inception, the purpose of RIB is to encourage coal workers with simple pneumoconiosis but no respiratory impairment to seek work outside the mining industry before their condition advances. See Howard v. Peabody Coal Co., 185 S.W.3d 165 (Ky. 2006). Though the legislature has employed various means to implement this legislative intent, the one statutory requirement that has remained constant is that liability for compensation for occupational disease lies with the employer where the employee was last injuriously exposed to the hazard of the disease. See KRS 342.316(1)(a), (10) and (11)(a). Though the language employed in the statutory provisions placing liability on the last employer is clear and unequivocal, a narrow exception was carved out by the court in National Mines Corp. v. Pitts, supra.

In that case, Pitts filed an occupational disease claim against National Mines. The medical proof revealed the

presence of category 1 pneumoconiosis and the claim was filed before Pitts began working for a subsequent employer. The court held that under those circumstances, the liability for a RIB award should not be shifted to the subsequent employer. Later, in Begley v. Mountain Top, Inc., 968 S.W.2d 91 (Ky. 1998), the court distinguished Pitts, noting that even if the evidence only supported a RIB award, the subsequent employer would be liable for benefits since the claimant in that case had only garnered some evidence. Even though the claimant filed his initial claim prior to his subsequent employment, the court stated: "[t]hus, unlike Pitts, the whole of the medical proof had not been introduced, and the claim was not under submission to the ALJ, prior to claimant's employment with [his subsequent employer]." Begley at 96.

Here, based on the record before us, it is obvious the evidence which addressed breathing impairment was not obtained until after Perkins was subsequently employed by Cumberland Resources and Perkins's claim was never under submission to the ALJ for a decision on the merits.

Since the decisions in Pitts, supra, and Begley, supra, the procedure for determination of occupational disease claims has been extensively overhauled. For coal related occupational pneumoconiosis claims, KRS 342.316(13) now requires "the consensus procedure shall apply to all claims which have not been assigned to an administrative law judge prior to July 15, 2002." Furthermore, the statute requires that the consensus classification of the B reader panel shall be presumed to be the correct classification of the miner's condition unless overcome by clear and convincing evidence. Just as important, an affected miner in a claim for RIB is authorized by statute to file a claim while working; however, benefits are not payable during the

> period the employee continues to work. KRS 342.732(1)(a)8.
>
> Recognizing that a miner may elect to continue to work after a RIB award, the legislature has further provided deferral of payment for a period of up to one year, after which benefits are reduced week-for-week for each week retraining benefits are further deferred. KRS 342.732(a)(10).
>
> This statutory scheme leads us to conclude the legislature did not intend that the employee be subjected to multiple consensus procedures in the pursuit of retraining. At the time Perkins filed his claim for benefits, he had left the employ of Highlands Mining and the consensus procedure was completed before he returned to work. The evidence submitted in the claim established no more than entitlement to a RIB award and his subsequent employment with Cumberland Resources did not vitiate the consensus procedure, obligating Cumberland Resources to be joined as a party and defend Perkins's claim.
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> In sum, we are satisfied the rationale provided by the supreme court in National Mines v. Pitts, supra, applies here. The current statutes under the admittedly narrow facts of this claim place liability for a RIB award on Highlands Mining since it was the employer in whose employ Perkins was last exposed as of the date his claim was submitted to the consensus procedure.
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> For the foregoing reasons, the order of the Administrative Law Judge dismissing is hereby REVERSED and the matter is REMANDED for further proceedings in conformity with the views expressed in this opinion.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, BRIAN PERKINS:

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