

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000527-WC

DONALD EALY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-12-00487

RC TRUCKING, INC;
HONORABLE J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW
JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Donald Ealy petitions for review of the Workers'
Compensation Board ("Board") opinion which affirmed the Administrative Law
Judge's ("ALJ") order dismissing the coal workers' pneumoconiosis ("CWP")

claim Ealy asserted against his former employer, RC Trucking, Inc. (“RC Trucking”). The issue on appeal is whether the Board correctly determined that Ealy’s claim was barred by the statute of limitations set forth in KRS¹ 342.316(4)(a). After review of the record and applicable law, we affirm.

On April 19, 2012, Ealy filed a Form 102-CWP alleging on March 11, 2005, he became affected by CWP arising out of and in the course of his employment with RC Trucking. Ealy maintained that he contracted CWP as a result of being exposed to dust at the job site and to hazards of the occupational disease during the twenty-one years he was employed there. Ealy’s last date of employment with RC Trucking was March 11, 2005.

In response, RC Trucking asserted that Ealy’s claim, filed seven years after the date of his last alleged exposure, was barred by the three-year statute of limitations contained in KRS 342.316(4)(a). Ealy then argued that the required consensus procedure and standard of proof for CWP claims, outlined in KRS 342.316(3) and (13), respectively, has been found to be unconstitutional by the Kentucky Supreme Court, *see Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455 (Ky. 2011), and thus, a statute of limitations cannot exist for an unconstitutional statute. Ultimately, the ALJ dismissed Ealy’s claim as untimely, noting that the Court’s decision in *Vision Mining* did not alter, or deem unconstitutional, the statute of limitations set forth in KRS 342.316(4)(a). Ealy appealed the ALJ’s decision to the Board, which affirmed. This appeal followed.

¹ Kentucky Revised Statutes.

The well-established standard of review for the appellate courts of a workers' compensation decision "is to correct the [Workers' Compensation] Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *E.g., W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992); *Butler's Fleet Serv. v. Martin*, 173 S.W.3d 628, 631 (Ky. App. 2005); *Wal-Mart v. Southers*, 152 S.W.3d 242, 245 (Ky. App. 2004). *See also Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986) (if the fact-finder finds in favor of the person having the burden of proof, the burden on appeal is only to show that there was some substantial evidence to support the decision); *cf. Gray v. Trimmer*, 173 S.W.3d 236, 241 (Ky. 2005) (if the ALJ finds against the party having the burden of proof, the appellant must "show that the ALJ misapplied the law or that the evidence in her favor was so overwhelming that it compelled a favorable finding.").

KRS 342.316 reads, in relevant part, as follows:

Liability of employer and previous employers for occupational disease; claims procedure; time limitations on claims; determination of liable employer; effect of concluded coal workers' pneumoconiosis claim; applicability of consensus procedure

(4)(a) The right to compensation under this chapter resulting from an occupational disease shall be forever barred unless a claim is filed with the commissioner **within three (3) years** after the last injurious exposure to the occupational hazard or after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to

apprise the employee that he or she has contracted the disease, whichever shall last occur; and if death results from the occupational disease within that period, unless a claim therefor be filed with the commissioner within three (3) years after the death; but that notice of claim shall be deemed waived in case of disability or death where the employer, or its insurance carrier, voluntarily makes payment therefor, or if the incurrence of the disease or the death of the employee and its cause was known to the employer. However, the right to compensation for any occupational disease shall be forever barred, unless a claim is filed with the commissioner **within five (5) years** from the last injurious exposure to the occupational hazard, except that, in cases of radiation disease or asbestos-related disease, a claim must be filed within twenty (20) years from the last injurious exposure to the occupational hazard.

(emphasis added). As it applies to Ealy's case, the statute of limitations for filing his CWP claim is within three years, and no later than five years, from the date of the last injurious exposure. *Id.*

In *Vision Mining*, the Supreme Court held:

Because we consider the classification of coal workers' pneumoconiosis claimants to be arbitrary in regard to the more stringent standard of proof or procedures required and believe that the disparate treatment afforded such workers lacks a rational basis or substantial justification, we hold that the consensus procedure and the clear and convincing evidentiary standard are unconstitutional.

Id. at 473.

In other words, the Court held that KRS 342.316(3)'s required consensus procedure for proving the existence of CWP and KRS 342.316(13)'s "clear and convincing" standard for rebuttal evidence to establish the existence of CWP, but

not for any other type of pneumoconiosis, violated the equal protection guarantees of the Federal and State Constitutions and was unconstitutional. *Id.* at 473. The Court did not strike down or alter the provisions of KRS 342.316(4)(a), governing the statute of limitations for CWP claims. Significantly, Ealy does not contend that KRS 342.316(4)(a) is unconstitutional and/or no longer in effect. Instead, he asserts that in all likelihood the Kentucky Legislature will see fit in the near future to make provisions for coal miners such as him to be able to pursue their claims. He asks this court to reverse the Board's decision and remand this case to the ALJ to place his claim in abeyance pending action by the Kentucky Legislature with respect to the statute of limitations for CWP claims.

However, not only is Ealy's claim for relief based upon pure speculation that the Legislature will take action in the future, the language of KRS 342.316(4)(a) has not been held to be unconstitutional and is still in effect. Pursuant to KRS 342.316(4)(a), a CWP claimant must file his or her claim within three years of the last date of injurious exposure and no later than five years after the last exposure. Ealy's Form 102-CWP indicates that he was last exposed to and became affected by CWP on March 11, 2005, his last date of employment with RC Trucking. Since Ealy did not file his claim for CWP benefits for over seven years after his last alleged injurious exposure, the ALJ properly dismissed his claim as barred by the statute of limitations. The Board did not err by affirming that decision.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

McKinnley Morgan
London, Kentucky

BRIEF FOR APPELLEE:

Sara May Caudill
Paul Jones
Pikeville, Kentucky