# *IMPORTANT NOTICE*

## *NOT TO BE PUBLISHED OPINION*

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

RENDERED: February 19, 2004
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

FINAL
DATE 3-11-04 Ed. A. Grow, D.C.

2003-SC-0052-WC

WILLARD FOUCH — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-1392-WC
WORKERS' COMPENSATION BOARD NOS. 01-0562 & 92-9718

ISLAND FORK CONSTRUCTION; TUG VALLEY LAND DEVELOPMENT; BLAZE COAL COMPANY; SPECIAL FUND; HON. RONALD E. JOHNSON, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

An Administrative Law Judge (ALJ) dismissed the reopening of the claimant's settled retraining incentive benefit (RIB) claim on the ground that he sustained additional exposure to coal dust in a subsequent employment. The claimant later filed an application against his employer on the date of last exposure, but it was dismissed. The Workers' Compensation Board (Board) and the Court of Appeals have rejected the claimant's argument that his rights vested under the law in effect when he filed his RIB claim. We affirm.

On March 9, 1992, the claimant filed a RIB claim, naming Blaze Coal Company (Blaze), as the defendant-employer. The parties later agreed to settle the claim for a lump sum of $18,000, and the agreement was approved on October 13, 1992. The

claimant continued to work in the coal mining industry and to be exposed to coal dust until December 12, 1998, at which time he was laid off by Island Fork Construction (Island Fork). At the time, he had more than a 30-year history of working in the coal mines, with various mining companies. His final employment was as a watchman for Tug Valley Land Development (Tug Valley), which was not mining at the time.

On December 8, 2000, the claimant filed a motion to reopen his RIB claim, alleging a worsening of condition and increased occupational disability. He also moved to join the Special Fund and Tug Valley as parties to the claim. The Administrative Law Judge (ALJ) granted the motion to reopen the claim against Blaze and the motion to join the Special Fund to the claim but gave the claimant 30 days to file a new claim against Tug Valley. On April 9, 2001, the claimant filed a new application, naming both Tug Valley and Island Fork as defendants.

The reopened and new claims were consolidated on May 22, 2001. Shortly thereafter, Blaze moved to be absolved from further liability on the ground that the claimant was exposed to coal dust in subsequent employments. The claimant objected on the ground that the claim should not be dismissed until there was a finding that a subsequent employment was injurious. In an order entered on June 15, 2001, the ALJ noted the claimant's exposure to coal dust in subsequent employments, noted that only Blaze and the Special Fund were parties to the RIB claim, and dismissed the claim.

With respect to the claim against Island Fork and Tug Valley, the claimant relied upon evidence from Drs. Myers and Younes. Dr. Myers interpreted an April 26, 1999, x-ray as indicating Category 2/1 disease. Dr. Younes interpreted a June 14, 2000, x-ray as revealing Category 2/2 disease. He reported an FVC value that was 110.4% of the predicted normal and an FEV1 value of 80.4% of the predicted normal. In his opinion,

the primary cause of the below-normal FEV1 value was tobacco smoking, but occupational dust exposure was a contributing factor.

Island Fork relied upon Drs. Dahhan and Jarboe. Dr. Dahhan examined the claimant on May 14, 2001, and reported an x-ray reading of Category 0/0, FVC of 108%, and FEV1 of 87%. In his opinion, there was no evidence of coal workers' pneumoconiosis and no evidence of a pulmonary impairment or disability that was caused by, contributed to, or aggravated by the inhalation of coal dust.

Dr. Jarboe classified May 30, 2001, x-rays that were taken by Dr. Dahhan as Category 0/1. He reported finding a few irregular opacities in all lung zones bilaterally, but he indicated that the profusion was insufficient to diagnose coal workers' pneumoconiosis. He also noted that the irregular shape of the opacities was not typical of pneumoconiosis.

Drs. Burki and Leiber performed a university evaluation on April 3, 2001. Pulmonary function studies yielded an FVC value of 110% and an FEV1 value of 80%. Dr. Leiber classified the claimant's x-ray as Category 1/0. After examining the claimant and reviewing the various findings, Dr. Burki concluded that the claimant did not suffer from pneumoconiosis, that coal dust was not the likely cause of any pulmonary impairment, and that the claimant suffered from emphysema due to cigarette smoking.

The ALJ's opinion and order was styled "Willard Fouch v. Blaze Coal Co. and Special Fund," but consistent with the previous order dismissing the claim against Blaze Coal Co., it referenced only claim #01-00562, the claim against Tug Valley and Island Fork. Furthermore, the body of the document noted that Blaze had been dismissed as a defendant. Giving presumptive weight to the university evaluation, the ALJ determined that the claimant's x-ray category was 1/0, his FVC was 110%, and his

FEV1 was 80%. The ALJ noted, however, that exposure to coal dust was not the cause of the claimant's lung problems. Furthermore, even if Dr. Burki's opinion that the claimant did not suffer from pneumoconiosis were disregarded, his x-ray category and spirometric values were insufficient to permit a recovery. The ALJ concluded, therefore, that the claimant was not entitled to additional benefits and dismissed the claim against Island Fork.

At that point, the claimant petitioned for reconsideration of the previous order dismissing Blaze Coal Co. as a party and also petitioned for reconsideration of the evidence under the standard in effect on the date of the RIB claim. He asserted that the 1992 claim against Blaze was the basis for the current proceeding and, therefore, that the university evaluation was not entitled to presumptive weight. Overruling the petition, the ALJ pointed out that under Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88 (2001), the report of a university evaluator was entitled to presumptive weight in all pneumoconiosis claims and also that the claimant's date of last exposure was December 12, 1998.

The Board affirmed. Noting the claimant's failure to raise an issue on appeal regarding the dismissal of the claim against Island Fork, the Court of Appeals dismissed Island Fork as a party to the appeal and affirmed with respect to the remaining parties. Although the ALJ dismissed the RIB claim on the basis of the claimant's subsequent exposure in other employments, the claimant has not argued that it was error to do so. He maintains that his rights vested when he filed the RIB claim in 1992 and that because he sought to reopen it, the ALJ erred by failing to apply the 1992 versions of KRS 342.125 and KRS 342.732 when considering the merits of his entitlement to additional benefits. Although he has failed to raise an argument that the Court of Appeals erred by dismissing Island Fork as a party to the appeal, he does argue that

KRS 342.316(1)(a) places "at least a portion" of the liability for any award on Island Fork, his employer on the date of last injurious exposure.

Pneumoconiosis is an irreversible and progressive disease. But even if we were to assume that the claimant suffered from simple pneumoconiosis when he filed his initial claim against Blaze, he offered no medical evidence concerning his x-ray and pulmonary status when his employment with Blaze ceased, and there is no indication that the disease progresses of its own accord after an exposure ceases. See Slone v. R & S Mining, Inc., Ky., 74 S.W.3d 259, 261 (2001). Therefore, he presented no basis for imposing additional liability against Blaze. As the claimant concedes, KRS 342.316(1)(a) places liability for pneumoconiosis benefits on the employment in which the last hazardous exposure occurred. Reopening is not the proper procedure where after filing and settling a RIB claim against one employer, the worker sustains additional exposure to coal dust in a subsequent employment. See Blackburn v. Lost Creek Mining, Ky., 31 S.W.3d 921 (2000). As the ALJ obviously recognized when refusing to join Tug Valley to the reopened claim and giving the claimant time to file a new claim, the effects of a post-award exposure in a different employment are properly the subject of a new claim against the subsequent employer. Id. For that reason, the claimant's right to any additional benefits was properly the subject of the claim against Tug Valley and Island Fork, and that claim was properly decided under the law in effect on the date of last exposure.

The decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Leonard Joseph Stayton
P.O. Box 1386
Inez, KY 41224

COUNSEL FOR APPELLEE,
ISLAND FORK CONSTRUCTION:

Kimberly Newman
Jenkins, Pisacano, Robinson & Bailey
Court Square Building
Suite 100
Lexington, KY 40507

William E. Brown II
444 W. Second Street
Lexington, KY 40507

COUNSEL FOR APPELLEE,
BLAZE COAL COMPANY:

J. Gregory Allen
Riley, Walters & Damron, P.S.C.
4 W. Graham Street
P.O. Drawer 31
Prestonsburg, KY 41653

COUNSEL FOR APPELLEE,
SPECIAL FUND:

David W. Barr
Workers' Compensation Funds
1047 U.S. Hwy. 127 South, Suite 4
Frankfort, KY 40601