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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: September 23, 2004
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

DATE 10-14-04 ELIA Grant, D.C.

2003-SC-0821-WC

CONSOL ENERGY, INC. APPELLANT

APPEAL FROM COURT OF APPEALS
V. 2003-CA-0868-WC
WORKERS' COMPENSATION BOARD NOS. 01-1649 & 01-1650

DANNY M. HALL; HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant learned he suffered from coal workers' pneumoconiosis on August 25, 2000, when he received the results of an x-ray performed at his employer's request and, on that basis, concluded that notice given on October 25, 2000, was timely. Although the employer asserted that symptoms the claimant reported in 1995 together with the notation "black lung" in his medical records established that he knew he suffered from pneumoconiosis at that time, the Workers' Compensation Board and the Court of Appeals noted that 1995 chest x-rays were negative and affirmed the ALJ's decision. Likewise, we affirm.

Since 1976, the claimant worked primarily as an underground coal miner. In March, 1995, he sought treatment from Dr. Yalamanchi concerning complaints of chest pain. Dr. Yalamanchi's March 31, 1995, report noted that the claimant was a coal miner and former smoker. A section of the report entitled "Review of Systems," listed the

following with respect to the respiratory system, "Black Lung. Bronchitis. Pneumonia. Shortness of breath with activity." Dr. Yalamanchi testified subsequently that he had never diagnosed black lung or treated the claimant for it. He explained that he had made the notation as a possible diagnosis based upon the claimant's symptoms and history of exposure to coal dust; however, an April, 1995, chest x-ray showed no evidence of the condition or active cardiopulmonary disease. He also testified that he had never seen a CT scan or x-ray evidence that the claimant had black lung. Dr. Yalamanchi's assessment was angina pectoris, based upon a positive stress test; hypertension and hypertensive heart disease; and hypercholestrelemia. He recommended an echocardiogram and cardiac catheterization and admitted the claimant to the hospital for the latter procedure.

When cross-examined, Dr. Yalamanchi explained that many people who work in coal mines have black lung; therefore, when such an individual reports shortness of breath, black lung is listed in the review of systems. He stated that he did no workup for black lung and made no attempt to diagnose the condition. His concern was evaluating the chest pain. He stated that there was "no way to tell definitely" that the claimant had not told him he had been diagnosed with black lung and acknowledged that it was possible. He stated that bronchitis was listed on the report based upon the claimant's symptoms but that pneumonia would have been listed based upon a previous history of the condition. He reiterated that his major concern as a cardiologist was with cardiac symptoms and shortness of breath.

The claimant began working for the defendant-employer on March 24, 1996, after undergoing a mandatory pre-employment physical examination. The examination included a chest x-ray, the results of which were normal. In August, 2000, the employer

directed its employees to undergo chest x-rays at the job site. The claimant did so, and on August 25, 2000, he was informed that he suffered from pneumoconiosis. His attorney sent a written notice to the employer on October 25, 2000.

Dr. Jarboe, a pulmonary specialist, performed x-rays on July 12, 2001, that revealed category 2/3 complicated pneumoconiosis. He noted that they showed a definite progression from x-rays taken in December, 2000, which had shown category 2/2 disease. On Dr. Jarboe's recommendation, the claimant resigned in September, 2001. He filed a Form 102 application on December 19, 2001.

When the pneumoconiosis claim was decided, notice and limitations were among the contested issues. Addressing them together, the ALJ stated as follows:

> The first issue to be determined . . . is whether or not he gave due and timely notice of the same and whether or not his application for benefits was filed timely and within the [statute] of limitations. **KRS 342.316(4)(a)** states in part, "the right to compensation under this chapter resulting from an occupational disease shall be forever barred unless this claim was filed with the commissioner within three years after the last injurious exposure to the occupational hazard or after the employee first experiences a distinct manifestation of the occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted that disease, whichever shall last occur." (emphasis original).
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> In this case, it is clear the Plaintiff did not know he had contracted coal workers' pneumoconiosis until he had an x-ray done on August 25, 2000 at the request of the employer. Upon receiving notice from the results of that x-ray that he had contracted coal workers' pneumoconiosis Plaintiff testified he retained an attorney who filed written notice with the Employer on October 25, 2000. The Administrative Law Judge is of the opinion that giving the employer notice two months after discovering he had contracted coal workers' pneumoconiosis is clearly reasonable notice. In regard to the [statute] of limitations argument, it is likewise clear the Plaintiff filed his Form 102 on December 19, 2001 which is well within the three year statute of limitations.

The employer's sole argument on appeal is that the ALJ erred in determining that the claimant gave timely notice of his claim.

KRS 342.316 (2) provides, in pertinent part, as follows:

> [N]otice of claim shall be given to the employer as soon as practicable after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted the disease, or a diagnosis of the disease is first communicated to him, whichever shall first occur.

Contrary to the employer's assertion, there is no indication that the ALJ resolved the notice issue under KRS 342.316(4)(a) rather than KRS 342.316(2). KRS 342.316(2) requires "notice of claim." For that reason, it has long been established that even a worker who has been diagnosed with an occupational disease is not required to give notice until he is disabled and that a worker is not disabled by an occupational disease so long as he continues to work full time for the same employer. Blue Diamond Coal Co. v. Stepp, Ky., 445 S.W.2d 866, 868 (1969). Despite certain dicta upon which the employer relies, the court refused to disturb the presumption of nondisability in Newberg v. Slone, Ky., 846 S.W.2d 694, 697 (1992). Furthermore, Slone involved a claim that arose before KRS 342.732 took effect. Under KRS 342.732, a worker does not have a claim until there is x-ray evidence that he suffers from the requisite category of pneumoconiosis, regardless of whether symptoms lead him to suspect that he does.

The employer argues that Dr. Yalamanchi's March 31, 1995, notation and the symptoms of which the claimant complained establish that he knew he suffered from pneumoconiosis at that time. Therefore, he was obliged to notify the defendant-employer of the condition, presumably when he was hired in 1996. This argument is without merit.

Dr. Yalamanchi testified that he was aware of no CT or x-ray evidence of pneumoconiosis, and there was x-ray evidence that the claimant did not suffer from pneumoconiosis in 1995. Although the claimant may have experienced symptoms that

were consistent with pneumoconiosis in 1995 and may have suspected that he suffered from the condition, there was no evidence to support a claim at that time. The earliest x-ray that revealed the presence of the condition was taken in August, 2000. On that basis, the ALJ determined that the claimant learned of his diagnosis in August, 2000, and gave timely notice. The decision was supported by substantial evidence and made under a correct interpretation of the law; therefore, it may not be disturbed on appeal. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

The decision of the Court of Appeals is affirmed.

All concur.

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