# *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## *NOT TO BE PUBLISHED OPINION*

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***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: October 20, 2005
NOT TO BE PUBLISHED

# Supreme Court of Kentucky FINAL

2005-SC-0168-WC DATE 11-10-05 Ewbank P.C.

CALVIN BLACK APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2004-CA-1079-WC
WORKERS' COMPENSATION BOARD NO. 02-1755

CMT TRUCKING; ELMER KINCAID, JR., D/B/A
ELMER KINCAID JR TRUCKING; AND HON.
J. LANDON OVERFIELD, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

In 1991, an Administrative Law Judge (ALJ) determined that the claimant suffered from category 1 pneumoconiosis and awarded a retraining incentive benefit. Appealing from the decision in a 2002 claim against a subsequent employer, the claimant asserts that the 1991 finding precluded a subsequent finding that he did not suffer from pneumoconiosis. The Workers' Compensation Board (Board) and the Court of Appeals have affirmed. We affirm.

In his 1991 claim against Nally & Hamilton, Inc., the claimant alleged that he was last exposed to coal dust on December 23, 1989, and suffered from coal workers' pneumoconiosis. Relying on Drs. Anderson, Baker, and Myers, who reported category 1/1 pneumoconiosis, an ALJ determined on December 6, 1991, that the claimant suffered from category 1 disease without respiratory impairment. In 1992, he returned to work with a different employer, hauling gravel. He began working for the defendant-

employer in September, 1999, as a coal truck driver and loader operator. His last exposure occurred on March 23, 2002, and he has not worked since then.

On September 10, 2002, the claimant had a chest x-ray, which was forwarded to Dr. Vuskovich, a certified B-reader. Dr. Vuskovich reported that the film was Quality 1 and revealed pneumoconiosis, category 2/1, q/q, affecting all six lung zones. On October 14, 2002, the claimant filed an application for benefits and submitted the x-ray and report.

The employer responded by filing a report from Dr. Dahhan, who evaluated an x-ray taken on April 22, 2003. He reported that the x-ray was Quality 1 and was negative for coal workers' pneumoconiosis. He also reported that the x-ray was negative for any other respiratory disease.

The employer filed the claimant's medical records from Pineville Community Hospital for the period from March, 2001, through April, 2002. They documented the presence of pulmonary emphysema but no other acute infiltration or congestion. Also filed were pulmonary studies from January 5, 2003, which revealed a FVC of 102% of the predicted normal value and an FEV1 of 82% of the predicted normal.

The claimant also filed a Form 108 report from Dr. Baker, a certified B-reader, who conducted a pulmonary evaluation on June 18, 2003. The Form 108 indicated that a June 18, 2003, x-ray revealed category 1/0 pneumoconiosis. Pre-bronchodilator spirometric testing yielded an FVC of 110% of the predicted normal value and an FEV1 of 71% of the predicted normal. Post-bronchodilator values were 99% (FVC) and 67% (FEV1) of the predicted normal values. He diagnosed chronic obstructive airways disease and a mild ventilatory defect and attributed the conditions as well as the category 1/0 disease to the claimant's exposure to coal dust.

The Commissioner of the Department of Workers' Claims certified that there was no consensus. The x-rays were then submitted to a consensus panel of certified B-readers, including a board-certified radiologist (Dr. West) and two board-certified pulmonary specialists (Drs. Pope and Powell). Their reports were as follows:

| Physician | X-ray Date | Quality | Category |
|---|---|---|---|
| Dr. Pope | B | 2 | 0/1, p/p |
| Dr. Powell | B | 1 | 1/1, s/t* |
| Dr. West | Unknown | 1 | 0/0 |

* Dr. Powell also found evidence of borderline blunting on the right cp angle.

On August 6, 2003, the Commissioner notified the parties that the reports were in consensus and indicated that the claimant did not suffer from pneumoconiosis.

Attempting to rebut the consensus, the claimant re-submitted Dr. Baker's Form 108 together with the x-ray to which it referred and deposed Dr. Pope. Dr. Pope explained the phenomenon of intra-observer error and acknowledged that although he had characterized x-ray B as category 0/1, he might well have characterized it as category 1/0 on a different day. He also testified, however, that an x-ray with poor contrast between the dark and light areas is graded Quality 2. He explained that such an x-ray can mimic pneumoconiosis or exaggerate the appearance of it and might cause a physician to slightly over-read the film.

The ALJ determined that there was no clear and convincing evidence to rebut the consensus classification and concluded that the claimant did not have coal workers' pneumoconiosis. Appealing the decision, the claimant asserted that the doctrine of res judicata precluded a finding that he suffered from less than category 1 disease. He also asserted that Dr. Vuskovich's report was clear and convincing evidence that his

condition had progressed from category 1 to category 2 and that the ALJ was required to rely upon it.

Like a final judgment in a civil action, a final workers' compensation award is enforceable as a judgment in circuit court. KRS 342.305; see also, Godbey v. University Hospital of the Albert B. Chandler Medical Center, Inc., 975 S.W.2d 104, 105 (Ky. App. 1998). Although KRS 342.125 permits the reopening of an otherwise final award under specified circumstances, the doctrine of res judicata applies to final workers' compensation decisions. See Slone v. R & S Mining, Inc., 74 S.W.3d 259 (Ky. 2002). As explained in Yeoman v. Com., Health Policy Board, 983 S.W.2d 459, 464 (Ky. 1998), res judicata is the Latin term for "a matter adjudged." It stands for the principle that a final judgment is conclusive of causes of action and facts or issues thereby litigated. Two aspects of the doctrine are claim preclusion and issue preclusion, which is also referred to as collateral estoppel. Claim preclusion bars a party from relitigating a previously-adjudicated cause of action; whereas, issue preclusion bars a party to a judgment from relitigating an issue that is identical to an issue that was previously litigated, finally decided, and essential to the previous judgment. Issue preclusion may be used both offensively and defensively. It may be used against a party to an action by one who was not a party to preclude the relitigation of a matter that was fully litigated and finally decided. See Moore v. Commonwealth, Cabinet for Human Resources, 954 S.W.2d 317 (Ky. 1997); Godbey, supra, at 105. However, a party to an earlier judgment may not use it against one who was not a party to the action and, therefore, did not have a full and fair opportunity to litigate the issue. Id.

The claimant attempts to use the 1991 finding to rebut the consensus in his present claim, but the defendant-employer was not a party to the 1991 claim and,

therefore, was not bound by the finding that the claimant suffered from category 1 disease. In contrast, the claimant was a party to the 1991 judgment that he suffered from category 1 disease. The finding that he suffered from category 1 disease in 1991 bound him in the present claim to the extent that his burden was to show that his exposure while working for the defendant-employer caused a subsequent harmful change in the human organism, i.e., a higher disease category or respiratory impairment. The consensus classification did not support such a finding. Although Dr. Vuskovich reported category 2/1 disease, Dr. Baker reported category 1/0, and Dr. Pope testified about intra-observer error, the ALJ was not convinced that there was clear and convincing evidence to rebut the consensus classification. Nor are we convinced that the evidence in the claimant's favor was so overwhelming that it compelled a favorable finding as a matter of law.

The decision of the Court of Appeals is affirmed.

All concur.

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