

OPINION ENTERED: March 1, 2013

CLAIM NO. 201200487

DONALD EALY

PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD,
 CHIEF ADMINISTRATIVE LAW JUDGE**

RC TRUCKING, INC.
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING
* * * * ***

BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

STIVERS, Member. Donald Ealy ("Ealy") seeks review of the June 4, 2012, order rendered by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ") determining his coal workers' pneumoconiosis ("CWP") claim is barred by the statute of limitations, KRS 342.316(4)(a), and dismissing the claim.

On April 19, 2012, Ealy filed a Form 102-CWP alleging on March 11, 2005, he "became affected by coal workers' pneumoconiosis arising out of and in the course of his employment." He stated he contracted CWP as a result of being exposed to dust at the job site and for twenty-one years he had been exposed to the hazards of occupational disease. Ealy attached a Form 104- Plaintiff's Employment History which reflects he was last employed for RC Trucking, Inc. ("RC Trucking") on March 11, 2005.

On May 14, 2012, RC Trucking filed a notice of resistance and special answer, a Form 111-OD, and motion to dismiss. In all three pleadings, RC Trucking asserted Ealy's claim was barred by the statute of limitations, KRS 342.316(4)(a). In its motion to dismiss, RC Trucking argued Ealy filed his claim seven years after the date of his last exposure, and the statute of limitations is three years with a saving clause of up to five years. Thus, "under no scenario" had Ealy timely filed his CWP claim.

In response, Ealy asserted the process by which CWP claims were decided has been found to be unconstitutional by the Kentucky Supreme Court and there is no statute of limitations for an unconstitutional act.

In the June 4, 2012, order dismissing Ealy's claim, the CALJ concluded, in relevant part, as follows:

The Kentucky Supreme Court decision to which Plaintiff alludes is ***Vision Mining, Inc. v. Gardner***, -- S.W.3d--, 2011 WL 6543000 (Ky.) which recently became final. That decision affirmed the decision of the Court of Appeals rendered in the same matter which specifically held that the consensus process set forth in KRS 342.316(3)(b)4.3-f to be unconstitutional. Neither the Court of Appeals nor the Supreme Court declared the entirety of KRS 342.316 unconstitutional. The applicable statute of limitations found in KRS 342.316(4)(a), in the opinion of the CALJ, is still a valid requirement for the filing of a coal workers pneumoconiosis claim. The CALJ having reviewed the pleadings and being fully and sufficiently advised thereby,

It is therefore ORDERED and ADJUDGED that Defendant-Employer's Motion to Dismiss is SUSTAINED and the above styled workers' compensation claim is hereby DISMISSED in its entirety.

No petition for reconsideration was filed.

On appeal, Ealy argues in *Vision Mining, Inc., v. Gardner*, 364 S.W.3d 455 (Ky. 2011), the Kentucky Supreme Court declared the consensus process applicable to CWP claims unconstitutional. Thereafter, Ealy underwent x-rays, was diagnosed with CWP, and filed his claim for CWP benefits. Ealy again maintains there is no statute of limitations for an unconstitutional statute arguing as follows:

In 2002, the Legislature, by enacting KRS 342.792, made provisions for coal miners who were subject to a university evaluation and had their claim dismissed to be able to reopen those claims, and also made provisions for coal miners with a date of last exposure between December 12, 1996 and July 15, 2001 to file original claims on or before December 12, 2003 or within the time frame prescribed by KRS 342.316(4)(a) whichever is longer. Therefore, there is every reason to believe that, based upon the recent Supreme Court decision that the consensus process is unconstitutional, our Legislature will see fit in the near future to make provisions for coal miners such as Ealy to be able to pursue benefits for contraction of coal workers' pneumoconiosis.

Ealy requests the Board reverse the CALJ's order dismissing his claim and remand the claim with instructions to place it in abeyance pending action by the legislature regarding CWP claims.

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.

The above section of KRS 342.316 is the statute of limitations for all occupational disease claims. Except for radiation disease or asbestos related disease, KRS 342.316(4)(a) makes no distinction regarding the time limit for filing a claim for any form of pneumoconiosis or other occupational disease. Therefore, any employee who has contracted an occupational disease other than a radiation

disease or asbestos related disease must file a claim "within three years after the last injurious exposure to the occupational hazard or after he first experiences a distinct manifestation of the disease sufficient to apprise him he has contracted the disease, whichever occurs last. In no event can an employee who has contracted an occupational disease maintain a claim beyond five years of his or her last date of injurious exposure to the occupational hazard.

Here, Ealy's Form 102-CWP indicates he was last exposed to and became affected by CWP on March 11, 2005. Ealy's Form 104 also reflects his last date of employment and exposure to coal and rock dust with RC Trucking was March 11, 2005. Consequently, as Ealy filed his claim on April 19, 2012, his claim is barred by the statute of limitations.

In Vision Mining, Inc. v. Gardner, supra, the Supreme Court stated as follows:

Because we consider the classification of coal workers' pneumoconiosis claimants to be arbitrary in regard to the more stringent 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.

The Supreme Court did not strike down or alter the provisions of KRS 342.316(4)(a). Because the Supreme Court declared the "consensus procedure and the clear convincing evidentiary standard" to be unconstitutional, this does not mean the entire statute, including the statute of limitations provision contained therein, is unconstitutional. Significantly, Ealy does not contend KRS 342.316(4)(a) is unconstitutional and/or no longer in effect. Therefore, we see no reason KRS 342.316(4)(a) does not apply to the case *sub judice*. Further, as requested by Ealy, we decline to reverse and remand with directions to place the claim in abeyance in order to give the legislature the opportunity to act.

The following language in Armco, Inc. v. Felty, 683 S.W.2d 641, 642 (Ky. App. 1985) is controlling:

It may be that a claimant should be compensated, if he can prove that the work caused his disability, but KRS 342.316(3) does not deal with a five-year presumption of causation. It simply says that, if you do not recognize your occupational disease and make your claim within five years of your last exposure to its cause, you cannot collect.

In this case, the only evidence presented was that Felty's last injurious exposure to the dust was prior to 1974. Since his claim was not filed with the board until October of 1981, he did not file within the five-year requirement of KRS 342.316(3), and therefore his claim is barred. A similar situation occurred in *Crawford v. V & C Coal, Co., Ky.*, 432 S.W.2d 403 (1968), where the court held that a worker's claim was barred by the five-year limitation provision of KRS 342.316(3), when he ceased working in 1957 and did not file a claim for pneumoconiosis benefits until October of 1966.

Here, without question Ealy's last injurious exposure to coal and rock dust was March 11, 2005. Therefore, since Ealy did not file a claim for CWP benefits for over seven years after his last injurious exposure, his claim is barred by the statute of limitations.

Accordingly, the June 4, 2012, order dismissing Ealy's claim of the CALJ is **AFFIRMED**.

ALL CONCUR.

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