

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

December 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

JEFFERY MURRAY, Petitioner

vs.) **No. 11-0472** (BOR Appeal No. 2044747)
(Claim No. 2009054721)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
ALCAN ROLLED PRODUCTS – RAVENSWOOD,
LLC, Respondent**

MEMORANDUM DECISION

Petitioner Jeffery Murray, by Edwin Pancake, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Alcan Rolled Products, by H. Toney Stroud, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 14, 2011, in which the Board reversed a June 23, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's November 10, 2008, decision holding the claim compensable for occupational pneumoconiosis on a non-medical bases with a date of last exposure of February 13, 1994. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Mr. Murray alleges that he suffers from occupational pneumoconiosis as a result of exposure to occupational dust hazards during his employment with Alcan Rolled Products, where he performed a variety of job duties. On November 7, 2008, Mr. Merrifield, industrial hygienist for Alcan Rolled Products, stated in a letter that Alcan Rolled Products was fully compliant with OSHA regulations regarding permissible exposure limits to occupational dust from February 14, 1994, until Mr. Murray's date of last employment, which was July 15, 2008,

in all of the departments where Mr. Murray had worked during the course of his employment. In an August 28, 2009, affidavit, Mr. Merrifield stated that asbestos, refractory ceramic fibers, and fiberglass have the potential to become airborne and were known to be present in Mr. Murray's work environment. However, he went on to state that based on his personal experience and training, an investigation of Mr. Murray's work environment, and the results of dust surveys conducted in accordance with NIOSH methodology, Mr. Murray was not exposed to abnormal, excessive, or harmful quantities of dust after February 13, 1994.

West Virginia Code of State Rules § 85-20-52.2 (2006) states:

If the employer submits credible evidence demonstrating that it has been in compliance with OSHA and/or MSHA permissible exposure levels, as determined by sampling and testing performed in compliance with OSHA and/or MSHA regulations for the dust alleged by the injured worker, then the Commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, may consider that the dust exposure alleged by the injured worker does not suffice to satisfy the exposure requirements of W. Va. Code §§23-4-1(b) and 23-4-15(b) only for the period(s) covered by the sampling or testing. In order for the evidence to be deemed credible, it must be based upon regularly scheduled exposure samples from each work area where harmful exposure has been alleged, which samples will be obtained by certified industrial hygienists as defined by OSHA and/or MSHA regulations or government agencies, and the samplings must be obtained during the period for which the employer is seeking to avoid chargeability. The employer shall provide to all parties to the claim all discoverable communications to and from the industrial hygienist, and the entire test file, including the results of the industrial hygienist. In the absence of other relevant evidence, periods for which injured workers can demonstrate by credible evidence that the employer's sampling and test results do not accurately reflect conditions in the injured worker's work areas shall be included by the Commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, for the period of dust exposure which the claimant has alleged to be harmful.

The Office of Judges held that the data provided by Alcan failed to meet the criteria set forth within West Virginia Code of State Rules § 85-20-52.2. The Office of Judges found that there was no sampling data covering the area where Mr. Murray worked when he was employed in the finishing department from February 14, 1994, to March 7, 1994, or when he was employed in the plate department from November 21, 2002, to January 19, 2003. The Office of Judges further found that Alcan Rolled Products did not conduct sampling on a regular schedule based on its finding of a lack of consistency in the time period between sampling conducted in each department. The Office of Judges then held that because Mr. Murray was exposed to

occupational dust hazards throughout the course of his employment with Alcan Rolled Products, he is entitled to the presumption contained in West Virginia Code § 23-4-8c (b) (2009), which states in part: “If it can be shown that the claimant or deceased employee has been exposed to the hazard of inhaling minute particles of dust in the course of and resulting from his or her employment for a period of ten years during the fifteen years immediately preceding the date of his or her last exposure to such hazard and that the claimant or deceased employee has sustained a chronic respiratory disability, it shall be presumed that the claimant is suffering or the deceased employee was suffering at the time of his or her death from occupational pneumoconiosis which arose out of and in the course of his or her employment.”

In its decision reversing the Order of the Office of Judges and reinstating the claims administrator’s decision, the Board of Review also relied on West Virginia Code of State Rules § 85-20-52.2 and found that the evidence of record demonstrates that Alcan Rolled Products was in compliance with OSHA’s permissible occupational dust limits between February 14, 1994, and July 15, 2008, and that Mr. Murray was not exposed to the hazards of occupational pneumoconiosis during that time period. The Board of Review further found that Mr. Murray is not entitled to the presumption contained in West Virginia Code § 23-4-8c (b).

Both the Office of Judges and the Board of Review were incorrect in their analysis under West Virginia Code of State Rules § 85-20-52.2, as only portions of the data submitted by Alcan Rolled Products are not credible pursuant to the Rule. The Office of Judges found that regularly scheduled exposure sampling was not conducted, as is required by West Virginia Code of State Rules § 85-20-52.2; however, in his deposition Mr. Merrifield testified that there was a schedule in place for dust sampling, and that additional sampling took place as needed. The only portion of the sampling data not in compliance with West Virginia Code of State Rules § 85-20-52.2 are the data that was collected in two areas where Mr. Murray was employed at one time, but was not currently working at the time of the collection; these areas are the finishing department, where Mr. Murray was employed from February 14, 1994, to March 7, 1994, and the plate department, where he was employed from November 21, 2002, to January 19, 2003. Additionally, the Board of Review is correct in its determination that Mr. Murray is not entitled to the presumption contained in West Virginia Code § 23-4-8c (b), because he has not been exposed to the hazards of occupational pneumoconiosis for ten of the last fifteen years preceding his date of last exposure, which is July 15, 2008. Therefore, in addition to the exposure to occupational dust hazards before February 14, 1994, as determined by the claims administrator, pursuant to West Virginia Code of State Rules § 85-20-52.2 Mr. Murray was exposed to the hazards of occupational pneumoconiosis from February 14, 1994, to March 7, 1994, and from November 21, 2002, to January 19, 2003.

For the foregoing reasons, we find that the decision of the Board of Review is in clear violation of a statutory provision, and is also based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is reversed.

Reversed and Remanded.

ISSUED: December 13, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh