

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

MUNDY MAINTENANCE SERVICES & OPERATIONS,
Employer Below, Petitioner

FILED

June 9, 2011

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

vs.) No. 100832 (BOR Appeal No. 2043912)
(Claim No. 2008038977)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

SHARON J. WARD, widow of
SAMUEL K. WARD (deceased),
Claimant Below, Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 3, 2010, in which the Board affirmed a November 30, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's May 7, 2008 Order, which denied Ms. Ward's application for dependent's benefits. The appeal was timely filed by the petitioner. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Revised Rule 1(d), this matter should be, and hereby is, set for consideration under the Revised Rules of Appellate Procedure. 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. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. 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.

The Board of Review affirmed the Office of Judges grant of dependent's benefits. Mundy Maintenance Services & Operations ("Mundy") argues that the Occupational

Pneumoconiosis Board's conclusion that occupational asbestosis contributed in a material degree to his death is not borne out by their testimony. The Occupational Pneumoconiosis Board determined that bullous emphysema was primarily responsible for Mr. Ward's death, which the Occupational Pneumoconiosis Board attributed to cigarette smoking. It stated further that, due to his emphysema, he developed a pneumothorax, and he ultimately died due to cardiopulmonary arrest.

In reversing the claims administrator, the Office of Judges first noted Mr. Ward's significant asbestos exposure history of 38 years. (Nov. 30, 2009 Office of Judges Order, p.4.) It also considered the testimony of the Occupational Pneumoconiosis Board that occupational pneumoconiosis did contribute in a material degree to Mr. Ward's death. *Id.* Although the Occupational Pneumoconiosis Board agreed that bullous emphysema was primarily responsible for Mr. Ward's death, which was attributed to cigarette smoking, once Mr. Ward developed a pneumothorax, his fibrosis, which was related to occupational exposure, compromised him to such a degree that he could not survive. *Id.* The Occupational Pneumoconiosis Board went on to state that, had Mr. Ward not had asbestosis, he may have well survived. *Id.* "The appropriate test . . . is not whether the employee's death was the result of the occupational injury or disease exclusively, but whether the injury or disease contributed in any material degree to the death." Syl. pt. 3, *Bradford v. Workers' Comp. Comm'r*, 185 W. Va. 434, 408 S.E.2d 13 (1991). The testimony presented by the Occupational Pneumoconiosis Board satisfies this standard. Thus, the Office of Judges reversed the claims administrator, and the Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its June 3, 2010 decision.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. Therefore, the grant of petitioner's request for dependent's benefits is affirmed.

Affirmed.

ISSUED: June 9, 2011

CONCURRED IN BY:

Chief Justice Margaret Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:
Justice Menis E. Ketchum