

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

MARY HAWK, Petitioner

July 26, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-0047 (BOR Appeal No. 2044640)
(Claim No. 2010123223)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
PILGRIM'S PRIDE CORPORATION OF
WEST VIRGINIA, INC., Respondent**

MEMORANDUM DECISION

Petitioner, Mary Hawk, by Robert L. Stultz, her attorney, appeals the Board of Review Order denying compensability for an occupational disease. Pilgrim's Pride Corporation of West Virginia, Inc. (hereinafter "Pilgrim's Pride), by Stephen M. Mathias, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated December 6, 2010, in which the Board affirmed a May 21, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of compensability for an occupational disease. 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, response, 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.

Ms. Hawk asserts she was exposed to ammonia, resulting in hoarseness and a sore throat, on January 31, 2010, during the course of her employment with Pilgrim's Pride. Chad M. Randolph, Corporate Director, Safety and Health for Pilgrim's Pride acknowledged an ammonia leak occurred on this date. However, Mr. Randolph stated the leak was only 17 parts per million, Pilgrim's Pride's action level exposure is 25 parts per million and OSHA regulations provide for a 50 parts per million

exposure. This leak also occurred sixty feet from Ms. Hawk's work station. Following the exposure, Ms. Hawk asserts she attempted to seek medical treatment from the on duty EMTs. Both Lisa R. Champ and Serena D. Baker, EMTs for Pilgrim's Pride, attested they worked on January 30, 2010, and denied Ms. Hawk sought treatment on that date. Debra Smith, Occupational Nurse Manager for Pilgrim's Pride, also testified that Ms. Hawk did not report an injury on January 30, 2010, that Ms. Hawk has a hoarse and squeaky voice under normal circumstances and has suffered from this condition for many years. Josh Harper, complex safety manager for Pilgrim's Pride, also testified Ms. Hawk's work station is not near the location of the leak and Ms. Hawk would only be near the leak location going to and from her work station, a total of 10 seconds potential exposure.

Following the exposure Ms. Hawk sought treatment in the Grant Memorial Hospital emergency room, where she was released after no specific treatment and instructed to follow-up with her family physician whose treatment notes indicate Ms. Hawk complained of a cough which produced thick brown sputum, and complained of this problem six months prior to the January 30, 2010, date, which Ms. Hawk attributed to an old workers' compensation claim. Dr. Alan M. Ducatman evaluated Ms. Hawk and diagnosed occupational asthma with associated laryngitis upon exposure to irritants.

The Office of Judges held that Ms. Hawk is not an accurate reporter of her symptoms. Ms. Hawk asserted she was unable to speak on January 30, 2010; however, while in the emergency room, she was able to state her symptoms and relate a recent history of her complaints. Dr. Ducatman's report was afforded less weight because it relied entirely on Ms. Hawk's report of injury, including an exposure in 2000 which did not occur. Further, the Office of Judges found there is no evidence establishing Ms. Hawk sought treatment with an on-site EMT on January 30, 2010. Debra Smith testified Ms. Hawk suffered irregularity in her voice even without the ammonia leak. Additionally, the January 30, 2010, ammonia leak was well within the OSHA exposure limits. The Office of Judges, too, found no basis for granting compensability for an occupational disease or for disputing the claims administrator's findings. The Board of Review reached the same reasoned conclusion in its decision of December 6, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the Court affirms the Board of Review Order denying compensability for Ms. Hawk's claim that she suffered an occupational disease following exposure to ammonia.

Affirmed.

ISSUED: July 26, 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