

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

**Blue Creek Mining, LLC,**  
**Employer Below, Petitioner**

vs.) **No. 21-0762** (BOR Appeal No. 2056501)  
(Claim No. 2021002351)

**Richard Lambert,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Blue Creek Mining, LLC, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Richard Lambert filed a timely response.<sup>1</sup> The issue on appeal is compensability. The employer argues that the claimant did not file his claim within the statute of limitations because he wore hearing aids for nearly thirty years before he filed the claim and was aware that his hearing loss was due to work. The claims administrator rejected the claim on August 24, 2020. The Workers' Compensation Office of Judges ("Office of Judges") reversed the decision in its March 5, 2021, Order and held the claim compensable. The Order was affirmed by the Board of Review on August 24, 2021. Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the Board of Review's decision is appropriate. *See* W. Va. R. App. P. 21.

Mr. Lambert, a hoisting engineer in the coal mining industry, completed an application for hearing loss benefits on March 12, 2020, in which he stated that he worked for Kanawha Eagle and Blackhawk Mines from 1999 to 2016 with a date of last exposure of May 31, 2016. The physician's section was completed by Karim Katrib, M.D., who diagnosed bilateral sensorineural hearing loss with 23.47% impairment. On August 12, 2020, Mr. Lambert completed a hearing loss questionnaire asserting that he developed hearing loss as a result of occupational noise exposure to heavy machinery. The claims administrator rejected the claim on August 24, 2020, stating that the claim was untimely filed.

On October 12, 2020, Mr. Lambert testified in a hearing that from 1986 to 1999, he worked as a truck driver for Stowers & Sons Trucking ("Stowers"). He drove around coal mines, oil fields, and gas fields, and he stated that such work was very noisy. He did not always have an enclosed cab. Mr. Lambert stated that while working for Stowers, he suffered a right ear drum perforation

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<sup>1</sup>Blue Creek Mining, LLC, is represented by T. Jonathan Cook, and Mr. Lambert is represented by Anne L. Wandling.

during a gas line explosion. Mr. Lambert was treated and returned to work about a week later. He began wearing hearing aids in 1991. Mr. Lambert testified that he next worked as a hoisting engineer for Blue Creek Mining. That environment was also noisy. Mr. Lambert asserted that Dr. Katrib told him that his hearing loss was the result of his occupational noise exposure and that Dr. Katrib was the first doctor to inform him of such. On cross examination, Mr. Lambert was asked if he was aware that his hearing loss was work-related before he ceased working. Mr. Lambert responded that he was aware but testified that he was under the impression the hearing loss was due to his 1990 eardrum perforation. Mr. Lambert stated that he saw Dr. Mullins in 2015 because his hearing loss was worsening.

In its March 5, 2021, Order, the Office of Judges reversed the claims administrator's rejection of the claim and held the claim compensable for hearing loss. It noted that an application for hearing loss must be filed within three years from the date of the claimant's last exposure or within three years from and after the date the employees' occupational hearing loss was made known to him by a physician, or which he should reasonably have known, whichever occurs last. *See West Virginia Code § 23-4-15(c).*

The Office of Judges noted that there was no debate between the parties that Mr. Lambert's application would not have been timely filed within three years from his date of last exposure, May 31, 2016. Therefore, the question at issue is whether Mr. Lambert filed within three years of the date that his occupational-induced hearing loss was made known to him. The Office of Judges found that Mr. Lambert was involved in a work-related injury in 1990 that resulted in a perforated right ear drum. Mr. Lambert was treated by Dr. Touma, who fitted him for hearing aids. Mr. Lambert testified in his deposition that following his occupational injury, he continued to be exposed to occupational noise and experienced further hearing loss. Mr. Lambert stated that he filed a hearing loss claim after Dr. Mullins, an audiologist, performed hearing testing, and then Dr. Katrib informed him that his hearing loss was due to occupational noise exposure.

The Office of Judges found that the record does not include treatment notes from either Dr. Touma or Dr. Mullins. Therefore, the question is whether Mr. Lambert should reasonably have known that he suffered hearing loss due to occupational noise exposure. The Office of Judges found that given Mr. Lambert's age and prior ear drum injury, he could have reasonably believed his hearing loss was due to factors other than occupational noise exposure. It concluded that Mr. Lambert timely filed his claim because he filed within three years of the date that he was told by a physician that his hearing loss was the result of noise exposure. It therefore reversed the claims administrator's rejection of the claim and held the claim compensable. The Board of Review affirmed the Office of Judges' Order on August 24, 2021.

This Court may not reweigh the evidentiary record, but must give deference to the findings, reasoning, and conclusions of the Board of Review, and when the Board's decision effectively represents a reversal of a prior order of either the Workers' Compensation Commission or the Office of Judges, we may reverse or modify that decision only if it is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is 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. *See* W. Va. Code § 23-5-15(c) & (e). We apply a de novo standard of review to questions of law. *See Justice v. West Virginia Office Insurance Commission*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

West Virginia Code § 23-4-15(c) provides that

“[t]o entitle any employee to compensation for occupational disease other than occupational pneumoconiosis under the provisions of this section, the application for compensation shall be made on the form or forms prescribed by the Insurance Commissioner, and filed with the Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, within three years from and after the day on which the employee was last exposed to the particular occupational hazard involved or within three years from and after the employee’s occupational disease was made known to him or her by a physician or which he or she should reasonably have known, whichever last occurs...”

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. The Office of Judges, and by extension the Board of Review, did not err in finding the claim compensable. Though Mr. Lambert had hearing loss for several years, he attributed the loss to his prior ear drum injury. Once he was informed that the hearing loss was the result of noise exposure, he filed a claim within three years of that day. The claim is compensable.

Affirmed.

**ISSUED: June 13, 2023**

**CONCURRED IN BY:**

Chief Justice Elizabeth D. Walker  
Justice John A. Hutchison  
Justice William R. Wooton

**DISSENTING:**

Justice Tim Armstead  
Justice C. Haley Bunn

Armstead, Justice and Bunn, Justice, dissenting:

I dissent to the majority’s resolution of this case. I would have set this case for oral argument to thoroughly address the error alleged in this appeal. Having reviewed the parties’ briefs and the issues raised therein, I believe a formal opinion of this Court was warranted, not a memorandum decision. Accordingly, I respectfully dissent.