

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

**ALCAN ROLLED PRODUCTS - RAVENSWOOD, LLC,**  
**Petitioner**

**vs.) No. 101565 (BOR Appeal No. 2044446)**  
**(Claim No. 810077743)**

**WEST VIRGINIA OFFICE OF**  
**INSURANCE COMMISSIONER and**  
**RITA LEMON, widow of ROBERT LEMON**  
**(DECEASED), Respondent**

**FILED**  
**June 18, 2012**  
**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**

**MEMORANDUM DECISION**

Petitioner, Alcan Rolled Products - Ravenswood, LLC, by H. Toney Stroud, appeals the Board of Review Order granting Rita Lemon dependent's benefits in the amount of \$1,539.69.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated November 8, 2010, in which the Board affirmed a March 31, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's April 3, 2009, Order, which granted Ms. Lemon dependent's benefits in the amount of \$1,138.80. The Office of Judges increased Ms. Lemon's benefits to \$1,539.69. 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 parties' submissions 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 briefs, and the record presented, the Court finds that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Board of Review affirmed the Office of Judges' Order, which granted Ms. Lemon dependent's benefits in the amount of \$1,539.69. Alcan Rolled Products - Ravenswood, LLC ("Alcan") argues that Ms. Lemon is only entitled to benefits in the amount initially granted by the claims administrator: \$1,138.80. Alcan argues that the higher benefit rate includes benefits for disabilities unrelated to that which caused the decedent's death, namely a 1975 cervical spine injury. Because this cervical spine injury is not causally related to Mr. Lemon's death, it should not be included in the calculation of benefits.

The Office of Judges set forth the text of West Virginia Code § 23-4-10, which provides that “[i]n case a personal injury, other than occupational pneumoconiosis or other occupational disease, suffered by an employee in the course of and resulting from his or her employment, causes death, and disability is continuous from the date of the injury until the date of death, or if death results from occupational pneumoconiosis or from any other occupational disease, the benefits shall be in the amounts and to the persons as follows: . . . (b) . . . the dependents shall be paid for as long as their dependency continues in the same amount that was paid or would have been paid the deceased employee for total disability had he or she lived.” Relying on this language, the Office of Judges concluded that Ms. Lemon was entitled to the full amount Mr. Lemon was receiving at the time of his death, which included permanent total disability benefits for his cervical spine injury and permanent total disability benefits for occupational pneumoconiosis, which was a material contributing cause of Mr. Lemon’s death. Applying the plain language of the statute, the Office of Judges modified the claims administrator’s order to provide benefits in the monthly amount of \$1,539.69. The Board of Review reached the same conclusion in its November 8, 2010, Order.

The Office of Judges’ and Board of Review’s decisions, however, ignore this Court’s pronouncements in *Vandergriff v. Workers’ Comp. Comm’r*, 183 W. Va. 148, 394 S.E.2d 747 (1990). In that case, this Court was asked to determine whether the lump sum death benefits payable to a dependent following an employee’s death where that employee was receiving permanent total disability benefits but the death did not result from the compensable injury could be offset against those benefits a dependent may receive following an employee’s death that does result from an occupational injury or disease. This Court stated that “[t]he plain language of W. Va. Code § 23-4-10(e), states that dependents of an employee who dies from a disabling injury are not eligible for the lump sum death benefits provided by that section. The clear purpose of the statute is to provide limited benefits to dependents of a deceased employee who are not eligible for ordinary statutory death benefits under W. Va. Code § 23-4-10(b).” 183 W. Va. at 151, 394 S.E.2d at 750. In short, “[b]enefits payable to dependents under W. Va. Code § 23-4-10(e) are available only where the employee’s death resulted from causes ‘other than a disabling injury.’ On the other hand, where the employee’s death is a result of a compensable disabling injury or disease, widow’s benefits are payable under W. Va. Code § 23-4-10(b).” *Id.* Importantly, “[b]y utilizing the concepts of disabling and nondisabling injuries, the two statutes provide separate and distinct eligibility requirements.” *Id.* at 151-52, 394 S.E.2d at 750-51.

Thus, because Mr. Lemon’s death was caused by his occupational pneumoconiosis, his widow is not eligible for the benefits of his permanent total disability award that would be available had his death not been caused by an occupational disease. Therefore, the inclusion of benefits stemming from Mr. Lemon’s cervical spine injury permanent total disability award was improper, and Ms. Lemon’s monthly benefit amount should be reduced to the amount she would be owed without consideration of the cervical spine injury permanent total disability award. In other words, Ms. Lemon is only entitled to a monthly amount for the injury or disease, here occupational pneumoconiosis, that bears a causal connection to Mr. Lemon’s death.

For the foregoing reasons, we find that the decision of the Board of Review is clearly the result of erroneous conclusions of law. Therefore, the grant of dependent's benefits in the amount of \$1,539.69 is reversed, and the initial grant of dependent's benefits in the amount of \$1,138.80 is reinstated.

Reversed.

ISSUED: June 18, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Thomas E. McHugh

DISSENTING:

Justice Margaret L. Workman

Justice Brent D. Benjamin disqualified.