

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

September 14, 2012

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

SEVERSTAL WHEELING, INC.
(Formerly Wheeling-Pittsburgh Steel Corp.),
Employer Below, Petitioner

vs.) No. 11-0331 (BOR Appeal No. 2044748)
(Claim No. 2008043275)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
ERNEST GAMBELLIN, Respondent

MEMORANDUM DECISION

Petitioner Severstal Wheeling, Inc., by Lucinda Fluharty, its attorney, appeals the West Virginia Workers' Compensation Board of Review's Order finding the claim compensable. Ernest Gambellin, by Zachary Zatezalo, his attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated January 21, 2011, in which the Board affirmed a June 24, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's May 19, 2008, Order and held the claim compensable for bladder cancer as 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 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.

Mr. Gambellin worked for Severstal Wheeling, Inc. (Formerly Wheeling-Pittsburgh Steel Corp.) in several positions. On April 25, 2008, he filed a report of injury alleging bladder cancer as an occupational disease. The claims administrator on May 19, 2008, denied the claim for a lack of causal relationship between the alleged disease and Mr. Gambellin's employment.

In reversing the claims administrator, the Office of Judges held that the preponderance of the evidence established the claim was compensable for an occupational disease under West Virginia Code § 23-4-1(f) (2008). Severstal Wheeling, Inc. disagrees and argues that the claimant failed to meet his evidentiary burden of showing that he was exposed to hazards at work and that such hazards caused his condition.

In reaching the conclusion to hold the claim compensable, the Office of Judges considered the evidence provided at length. The Office of Judges noted that the evidence established that Mr. Gambellin was subjected to dermal and inhalation exposure of coal tar pitch and coal tar in his job, and that certain safety measures were at many times not working. It also noted that an OSHA report confirmed Mr. Gambellin's testimony that the gas blanketing system was often inoperable, and that maintenance and repairs at the plant lacked in several areas. The Office of Judges found that Dr. Johns, a toxicologist, acknowledged that exposure to coke oven emissions such as coal tar pitch, crude coal tar, and coke oven gas has been associated with bladder cancer. Additionally, the Office of Judges found the employer's argument that Mr. Gambellin was a smoker not credible. It concluded that the evidence established that the claim should be compensable for bladder cancer as an occupational disease. The Board of Review reached the same reasoned conclusion in its decision of January 11, 2011.

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 Board of Review Order is affirmed.

Affirmed.

ISSUED: September 14, 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