

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

BILLY G. ROSE,
Appellant

vs.) No. 35745 (BOR Appeal No. 2043132)
(Claim No. 2009049717)

FILED

May 13, 2011

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

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER
and KANAWHA TRUCKING, INC.,
Appellee**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order, dated January 27, 2010, in which the Board affirmed a May 14, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's September 17, 2008, Order that rejected the claimant's application for benefits. The appeal was timely filed by the petitioner, and a response was filed by the employer. 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 is set for consideration under the Revised Rules of Appellate Procedure. Having considered the parties' submissions and the decision of the lower tribunal, the Court is of the opinion that the decisional process would not be aided by oral argument. Upon consideration of the standard of review, the Court determines that, in part, prejudicial error exists in the decision of the lower tribunal. However, the 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 complete rejection of the claimant's application for occupational pneumoconiosis benefits. A claim administrator determined that the claimant "was not exposed to the hazards of Occupational Pneumoconiosis while employed by [respondent] Kanawha Trucking." The record establishes that, at the time the claimant filed his application, he had been employed for Kanawha Trucking for only 24 days. His diagnosis of pneumoconiosis was made before he began working for Kanawha Trucking.

However, the record also indicates that the claimant was exposed to the hazards of occupational pneumoconiosis on the work sites of other employers in the 17 years preceding the filing of his application for benefits. The claimant was exposed to coal and silica dust while working for KT Trucking from 1992 to 1994; for Big E Trucking from 1994 to 2002; for Little Creek Dock from 2002 to 2004; and Weatherby Processing from 2004 to March 2008. The claimant began working for respondent Kanawha Trucking on March 17, 2008 (where he contends he continues to be exposed to the hazards of pneumoconiosis).

For a claimant to be eligible for benefits for occupational pneumoconiosis, *W.Va. Code*, 23-4-1(b) [2008] requires that the claimant establish he/she has been exposed to the hazards of occupational pneumoconiosis in this State for either (a) “a continuous period of not less than two years during the ten years immediately preceding the date of his or her last exposure” to the hazards of occupational pneumoconiosis, or (b) “for any five of the fifteen years immediately preceding the date of his or her last exposure.”

The record plainly establishes that the claimant meets the eligibility requirements established in *W.Va. Code*, 23-4-1(b). To the extent that the claims administrator rejected the claimant’s application on the ground that he “was not exposed to the hazards of Occupational Pneumoconiosis,” the claims administrator’s decision was plainly wrong.

Once a claimant establishes eligibility for benefits for occupational pneumoconiosis, *W.Va. Code*, 23-4-1(b) shifts the burden from the claimant to the commissioner to determine which employer(s) will be held responsible for the claim. However, only employers for whom the claimant worked for 60 days in the 3 years prior to the date of last exposure may be held responsible. The statute states, in part:

The commission may allocate to and divide any charges resulting from such claim among the employers by whom the claimant was employed for as much as sixty days during the period of three years immediately preceding the date of last exposure to the hazards of occupational pneumoconiosis. The allocation shall be based upon the time and degree of exposure with each employer.

In the instant case, the record is clear that the claimant was not exposed to the hazards of occupational pneumoconiosis *while working for respondent Kanawha Trucking* for 60 days in the 3 years preceding the date he filed his claim. On that point, the claims administrator’s decision was correct. However, the record is just as clear that the claimant appears to have been exposed to pneumoconiosis hazards *while working for other employers*. Unfortunately, no attempt was made, by the commissioner or the claims administrator, to apportion the charges arising from the claim to any employer other than respondent Kanawha Trucking.

As a matter of law, under *W.Va. Code*, 23-4-1(b), that failure to act by the commissioner and/or claims administrator was error.

Accordingly, we hold that, to the extent the Board of Review's decision concluded that respondent Kanawha Trucking could not be charged as an employer responsible for the claimant's alleged injury, the decision is affirmed. However, the decision must otherwise be reversed, and the claim remanded for consideration under *W.Va. Code*, 23-4-1(b) of whether the claim should be allocated to and divided among any other employers.

Affirmed, in part, reversed, in part, and remanded.

ISSUED: May 13, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh