BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

CHANEY'S CONSTRUCTION RENOVATIONS AND RENTALS,

Appellant,

v.

RONALD KELLER,

Appellee.

Appeal No.:
JCN No.: 2019026433
Carrier No.: FWV900152967

BRIEF ON BEHALF OF APPELLANT, CHANEY'S CONSTRUCTION RENOVATIONS AND RENTALS

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II. ASSIGNMENTS OF ERROR

The final order of the Workers' Compensation Board of Review (BOR) dated August 2, 2022, which reversed the Claim Administrator's June 26, 2019, Order and held the claim compensable for myelodysplastic syndrome, is clearly wrong in light of the reliable, probative, and substantial evidence of record, or lack thereof, is arbitrary and capricious, and is in violation of the applicable statutes and regulations.

III. STATEMENT OF THE CLAIM

The Claimant began working for Chaney's Construction Renovations and Rentals (CCRR) in 2016 and worked sporadically until ceasing work altogether (CCRR and self-employed) after he contracted myelodysplastic syndrome (MDS). The Claimant completed Section I of a WC-1 Employees' and Physicians' Report of Injury form on June 19, 2019, alleging occupational injury to his blood and bone marrow. ***Exhibit 1.***

The Claimant signed an affidavit on June 10, 2019, which stated, as follows:

1. I make this affidavit in support of workers' compensation claim filed on my behalf.

2. I currently reside at 42 Ford Lane, Triadelphia, Ohio County, West Virginia 26059.

3. Since the early 1990s, I have consistently worked in, with, and/or around a myriad of roofing-related products and materials, such as tar-based and benzene-containing coatings, adhesives, primers, and sealants, for various employers.

4. I worked at A-A Roofs Done Right in 2001 and from 2009 through 2011 and Chaney's Construction Rentals & Renovations from 2016 through 2017, both in Wheeling, West Virginia, as a general laborer and roofer.

5. I worked at various other roofing companies in South Carolina and Ohio for a number of years and was exposed to roofing-related products and materials, such as tar-based and benzene-containing coatings, adhesives, primers, and sealants, for various employers in the aforementioned states.

6. While working at A-1 Roofs Done Right and Chancy's Construction Rentals & Renovations, in West Virginia, I was exposed specifically, but not limited, to the following roofing products and materials (many of which were purchased from Lowes and 84 Lumber):

    (a) Geocel 2300 Tri-Polymer Sealant
    (b) Geocel RP-400 Plastic Wet-Dry Surface Roof Cement
    (c) GACOFLEX E5320 2-Part Epoxy Primer/Filler
    (d) Karmak 19 Ultra Rubberized Asphalt Caulk

(e) TARCO Mineral Surface Cap Sheet
(f) Gardner-Gibson WET-R-DRI
(g) Blackjack Roll Roofing Adhesive
(h) Blackjack Roof & Foundation Coating
(i) IKO Roofing Products
(j) TAMKO Plastic Roof Cement
(k) Loctite Products
(l) Liquid Wrench Products

7. I worked in, with, and/or around the aforementioned roofing products and petroleum materials for 60 hours per week.

8. Furthermore, while employed as a general laborer and roofer at A-1 Roofs Done Right and Chaney's Construction Rentals & Renovations, I routinely washed my hands in and with employer-supplied gasoline and petroleum products as degreasers for the roofing tar. I specifically remember the gasoline and petroleum products coming from Smith Oil Company of New Cumberland, West Virginia. Other petroleum entities supplied additional gasoline and diesel fuels.

9. I was neither advised nor required to wear any personal protective equipment, including, without limitation, gloves, respirators, and safety glasses, throughout my employment at A-1 Roofs Done Right and Chaney's Construction Rentals & Renovations. Indeed, I was not advised that the material we worked with on the various roofing projects could cause cancer.

10. I was diagnosed with myelodysplastic syndrome (MDS) on or around June 21, 2017, after over fifteen (15) years as a roofer in the roofing industry.

Exhibit 2.

Dr. Christopher Martin completed a record review of this case on November 9, 2020, and was unable to conclude "to a reasonable degree of medical certainty that Mr. Keller's diagnosis of myelodysplastic syndrome (MDS) is causally related to his past occupational exposures with CCRR." ***Exhibit 3 at 1***. Dr. Martin noted five specific considerations. First, the claimant's tobacco use exposed him to many cancer-causing substances, including benzene. ***Id. at 1-2***. Second, epidemiological studies do not show a consistent association between roofing occupations and

leukemia. ***Id. at 2.*** Third, the claimant's 7th-chromosome deletion is also seen in "primary" cases of MDS, which are not the result of any chemical exposure. ***Id.*** Fourth, studies show that the majority of MDS cases remain unexplained. ***Id.*** Finally, and most importantly, there is an issue with latency—meaning MDS develops approximately 5-15 years after exposure, not within the few months the claimant worked with CCRR. ***Id. at 2-3.***

Specifically, Dr. Martin stated the following:

> Lastly, for Mr. Keller's employment with CCRR specifically, there is the issue of latency. **When cancers are caused by external exposures, they do not develop immediately but following a delay, usually of on the order of many years called the latent period.** It is accepted that chemotherapy can cause secondary MDS as well as treatment-associated AML (tAML). Notably, tAML is preceded by MDS in 70% of cases as noted in the article by Smith et al. included in the records. On page 39 of this document, Smith et al. provided a latent period for MDS and tAML of 5-7 years following exposure. Li and Schnatter (enclosed) state "**the data suggests that a period longer than 15 years is more relevant for benzene-induced MDS.**"
>
> **The medical records when seen by Dr. Das on 11/3/2017 document that Mr. Keller developed symptoms in April 2017. Biologically, his cancer was present for at least several months at a minimum to that date.** In the affidavit, Mr. Keller reports that **he worked at CCRR "from 2016 through 2017." This is not only a relative short duration of exposure with CCRR but, more importantly, does not allow for a sufficient latent period. In short, this chronology is incompatible with Mr. Keller's diagnosis of MDS being causally related to exposures while he was employed by CCRR in my opinion.**

Id.

The claimant testified on January 17, 2020. ***Exhibit 4.*** The Claimant testified ". . . I worked for them an average of three years." ***Id. at 17.*** He added ". . . I would say around '14, '15 – I would say about ' 14, and I worked with them steady until I was diagnosed with MDS." ***Id.*** The

Claimant said he mainly performed work on roofs explaining every apartment and every house had a roofing problem which he handled for the company. ***Id. at 17.*** The Claimant continued:

> Q So when you're doing roofing projects on rental properties, what types of activities do you do?
>
> A Well, mostly landlords like to do patch jobs. I mean, everybody is cheap. They want to do it the cheapest way. If you do a patch job, then you'll take a few shingles out, you'll put tar down, you'll put a few shingles in, seal it with caulking, you know, your tar caulking.
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> A lot of chimneys – you do a lot of chimneys with flashing, tar. Flat roofs, he had quite a few flat roofs, which the flat roofs – you just take buckets of your actual tar, pour it out, and you smooth it out and put it up against your walls, and it's a sealed product.
>
> Q When you're doing this tarring, is that the only thing you did was patch roofs the entire time you worked for them?
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> A No. I replaced roofs.
>
> Q In doing this roofing work for CCRC, how much of your weekly time, on a percentage basis, do you think you were working on the roof, actually working with the tar and the – we'll call it adhesive products?
>
> A Per week, probably about 10 to 15 hours a week.

Id. 17-18. On page 23 of the deposition, the claimant testified he worked anywhere from 40 to 60 hours per week working for CCRR. ***Id. at 23***. The claimant added of the 40 to 60 hours per week working for CCRR, he spent 15 to 20 hours per week roofing. But on page 58, the Claimant testified CCRR had only 13 to 15 different rental properties. Moreover, on page 58, the Claimant testified he had hundreds of exposures to cancer causing products and performed roofing work at least once per week. ***Id.*** The Claimant testified he received two W-2s from CCRR. ***Tr. at 65, 73.*** On page 33 of the transcript, the Claimant testified he had been "self-employed for years." He explained he had his contractor's license for over 20 years. ***Tr. at 33***. He added he contracted to

perform roofs noting he was "good" at roofs and liked doing work he was "comfortable" performing. ***Id.*** Thus, per the Claimant, he only advertised that he performed "roofing" jobs. ***Id. at 33-34.*** With respect to materials used to perform the roofing jobs as an independent contractor, the Claimant testified he used the exact same products listed on his affidavit. ***Id. at 63.***

An Itemized Statement of Earnings provided by the Social Security Administration showed the Claimant's earnings from CCRR as $2,925.00 in 2016 and $1,462.50 in 2017. ***Exhibit 5.*** By comparison, the Claimant was self-employed the following years:

- 1994: The claimant earned $1,570.00.
- 2011: The claimant earned $8,052.00.
- 2012: The claimant earned $16,286.00.
- 2013: The claimant earned $14,083.00
- 2014: The claimant earned $14,174.00.
- 2015: The claimant earned $6,760.00.
- **2016: The claimant earned $10,123.00.**
- **2017: The claimant earned $5,213.00.00.**

Id.

The claim was denied by order dated June 26, 2019. ***Exhibit 6.*** The BOR overturned the claim decision on August 4, 2022. ***Exhibit 7.***

IV. SUMMARY OF ARGUMENT

West Virginia claimants are required to establish a causal connection between their employment and the alleged occupational disease. Because there is no nexus between the Claimant's myelodysplastic syndrome diagnosis and his work at CCRR, the BOR clearly erred in reversing the Claim Administrator's Order and finding this claim compensable. Therefore, this Court should reverse.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument before the Court is requested as this matter involves one or more of the following:

(1) A case involving assignments of error in the application of settled law;

(2) A case claiming an unsustainable exercise of discretion where the law governing that discretion is settled;

(3) A case claiming insufficient evidence or a result against the weight of the evidence;

(4) A case involving a narrow issue of law; and

(5) A case in which a hearing is required by law.

VI. ARGUMENT

A. Standard of Review.

This Court is required to reverse a final order of the BOR when the substantial rights of the petitioner have been prejudiced because that final order is clearly wrong in view of the reliable, probative, and substantial evidence on the whole record or is wrong as a matter of law. W. Va. Code § 23-5-12(b)(5)(2005). The West Virginia Supreme Court of Appeals addressing the prior identical standard stated in Rhodes v. Workers' Compensation Division and Anchor Glass Container, 543 S.E.2d 289, 293 (W. Va. 2000), that "'when the Workers' Compensation Appeal Board reviews a ruling from the Workers' Compensation Office of Judges it must do so under the standard of review set out in W. Va. Code § 23-5-12(b) (1995), and failure to do so will be reversible error.' Syl. pt. Conley." The Rhodes court further stated that West Virginia Code § 23-5-12(b) also directs, in relevant part, that:

> [The WCAB] shall reverse, vacate, or modify the order or decision of the administrative law judge if the substantial rights of the

petitioner or petitioners have been prejudiced because the administrative law judge's findings are:

1) In violation of statutory provisions; or

2) In excess of the statutory authority or jurisdiction of the administrative law judge; or

3) Made upon unlawful procedures; or

4) Affected by other error of law; or

5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Rhodes v. Workers' Compensation Division and Anchor Glass Container, 543 S.E.2d 289, 293 (W. Va. 2000), citing Conley v. Workers' Compensation Division and Hercules, Inc., 199 W. Va. 196, 202, 483 S.E.2d 542, 548 (1997). In the instant claim the decision of the BOR is clearly wrong in light of the reliable, probative and substantial evidence of record, or lack thereof, is arbitrary and capricious and is in violation of the applicable statutes and regulations.

B. The BOR decision is clearly wrong because there is no nexus between the claimant's myelodysplasia and his employment at CCRR.

West Virginia Code § 23-4-1(f) states "a disease shall be deemed to have been incurred in the course of or to have resulted from the employment only if it is apparent to the rational mind." The six elements that must be satisfied before a condition can be considered an occupational disease are: (1) That there is a direct causal connection between the conditions under which work is performed and the occupational disease; (2) that it can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment; (3) that it can be fairly traced to the employment as the proximate cause; (4) that it does not come from a hazard to which workmen would have been equally exposed outside of the employment;

(5) that it is incidental to the character of the business and not independent of the relation of employer and employee; and (6) that it appears to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction. The West Virginia Supreme Court of Appeal has stated that:

> When a claim for occupational pneumoconiosis alleging asbestosis or any other disease defined by W. Va. Code, 23-4-1 1990, as occupational pneumoconiosis if filed, the Commissioner must follow the processing system for occupational pneumoconiosis claims and limit the initial determination to exposure and other non-medical facts as required by W. Va. Code, 23-4-15b 1990, **When a claim for occupational disease is filed, the Commissioner is to follow the usual processing procedure for personal injury claims and, because an occupational disease is alleged, the Commissioner must apply the six criteria outlined in W. Va. Code, § 23-4-1 1990, to determine if the alleged disease was "incurred in the course of and resulting from employment."**

Newman v. Richardson, 186 W.Va. 66, 410 S. E. 2d 705 (1991) Syl. pt. 2. (Emphasis added). In Marlin v. Bill Rich Construction, Inc., 198 W. Va. 635, 482 S.E.2d 620 (1996), the West Virginia Supreme Court addressed in detail the requirements of West Virginia Code § 23-4-1. The Court stated:

> We note that W. Va. Code § 23-4-1 also provides that occupational diseases other than occupational pneumoconiosis are to be compensated under the Workers' Compensation Act as an "injury" or "personal injury". Again, the statute requires that any such disease be *"incurred* in the course of and resulting from employment." (Emphasis added.) This Court has determined that "W. Va. Code § 23-4-1, provides coverage for each new occupational disease as medical science verifies it and establishes it as such, without the need for special legislative recognition by addition to the scheduled diseases." Syl. pt. 2, in part, *Powell v. State Workmen's Compensation Commissioner,* 166 W. Va. 327, 273 S.E.2d 832 (1980).
>
> "Unlike traumatic injuries, the causal connection for occupational

> diseases must be establishes by showing exposure at the workplace sufficient to cause the disease and that the disease actually resulted in the particular case." *Id.,, at 336, 273 S.E.2d at 837 (1980).* Moreover, W *Va. Code §* 23-4-1 stated six criteria to be used in evaluating the causal connection between employment and the occupational disease, "[The] six criteria [in W. Va. Code § 23-4-1] make it clear that the occupational disease need not have been foreseen or expected before its contraction. It thus follows that if the claimant can establish the statutory criteria defining an occupational disease, the claim is to be held compensable." Powell, 166 W. Va. at 334, 273 S. E.2d at 836 (1980). Furthermore, "if studies and research clearly link a disease to a particular hazard of a workplace, a prima facie case of causation arises upon a showing that the claimant was exposed to the hazard *and is suffering* from the disease to which it is connected," Id. at 336, 273 S.E. 2d at 837 (Emphasis added).

Marlin v. Bill Rich Construction, Inc., 198 W. Va. 635, 646-647, 482 S.E.2d 620, 631-632 (1996) (emphasis added). Thus, the West Virginia Supreme Court of Appeals has clearly stated that in a claim for an occupational disease, such as is alleged in this claim, the claimant has the burden of establishing the six criteria set forth in W. Va. Code § 23-4-1. Further, it has long been held that "In order to establish compensability an employee who suffers a disability in the course of his employment must show by competent evidence that there was a *causal connection* between such disability and his employment," Deverick v. State Workmen's Compensation Director, 150 W. Va. 145, 144 S.E.2d 498 (1965) (Syl.pt 3) (emphasis added). The claimant is required to establish that there is a causal connection between his employment and the alleged occupational disease. "Where proof offered by a claimant to establish his claim is based wholly on speculation, such proof is unsatisfactory and is inadequate to sustain the claim." Syl. Pt 4, Clark v. State Workmen's Compensation Comm'r, 155 W. Va. 726, 187 S.E.2d 213 (1972). In short, the claimant is obligated to prove each of the six elements of an occupational disease set forth in W. Va. Code § 23-4-1(f) by a preponderance of the evidence.

In the instant claim, the Claimant alleged he developed MDS as result exposure to numerous chemicals and substances, including, but not limited to tar, roofing cement, sealants, coatings, caulking, asphalt, and adhesives, which contain toxic and cancer-causing components such as benzene. The Claimant did not accurately represent his exposure to these substances during his employment with CCRR; and the BOR did not consider the limited duration of exposure, if any, to solvents during the Claimant's abbreviated stint of employment with CCRR. Therefore, the BOR's logic in finding a connection between MDS and the Claimant's employment at CCRR is clearly wrong and should be reversed or the issue remanded for additional evidence on the issue[1].

The claimant's earnings for CCRR follow:

- 2016: The claimant earned $2,925.00 for the entire year.
- 2017: The claimant earned $1,462.50 for the entire year.

The claimant testified he earned $15.00 per hour. ***Tr. at 53.*** Despite what was only a brief stint of employment with CCRR, the Claimant stated on the affidavit that he worked 60 hours per week as a roofer . He ". . . I worked for [CCRR] an average of three years." ***Tr. at 17.*** He added ". . . I would say around '14, '15 – I would say about ' 14, and I worked with them steady until I was diagnosed with MDS." ***Id.*** The Claimant said he mainly performed work on roofs explaining every apartment and every house had a roofing problem which he handled for the company. ***Id. at 17.*** The Claimant continued:

> Q So when you're doing roofing projects on rental properties, what types of activities do you do?
>
> A Well, mostly landlords like to do patch jobs. I mean, everybody is cheap. They want to do it the cheapest way. If you do a patch job, then you'll take a few shingles out, you'll put tar down,

[1] A timely motion to extend the evidentiary deadline was filed with the BOR. An affidavit from the employer was being finalized but could not be completed before the deadline due to illness and COVID related problems.

you'll put a few shingles in, seal it with caulking, you know, your tar caulking.

A lot of chimneys – you do a lot of chimneys with flashing, tar. Flat roofs, he had quite a few flat roofs, which the flat roofs – you just take buckets of your actual tar, pour it out, and you smooth it out and put it up against your walls, and it's a sealed product.

Q When you're doing this tarring, is that the only thing you did was patch roofs the entire time you worked for them?

A No. I replaced roofs.

Q In doing this roofing work for CCRC, how much of your weekly time, on a percentage basis, do you think you were working on the roof, actually working with the tar and the – we'll call it adhesive products?

A Per week, probably about 10 to 15 hours a week.

Id. 17-18. On page 23 of the deposition, the claimant testified he worked anywhere from 40 to 60 hours per week working for CCRR. ***Id. at 23***. The claimant added of the 40 to 60 hours per week working for CCRR, he spent 15 to 20 hours per week roofing.

But on page 58, the Claimant testified CCRR had only 13 to 15 different rental properties. Moreover, on page 58, the Claimant testified he had hundreds of exposures to cancer causing products and performed roofing work at least once per week. ***Id.***

The Claimant's testimony regarding the amount of time he spent with CCRR is not consistent with the years he worked for the company or the amount of earnings he received from the company. The Claimant testified he received two W-2s from CCRR which is consistent with the Itemized Earnings provided by Social Security. ***Tr. at 65, 73.*** If the claimant was paid $15/hour, he would have worked a total of 195 hours for all of 2016 (approximately five 40-hour weeks) and only 97.5 hours in 2017 (approximately 2 ½ 40-hour weeks).

By comparison, the Claimant was self-employed the following years:

- 1994: The claimant earned $1,570.00.
- 2011: The claimant earned $8,052.00.
- 2012: The claimant earned $16,286.00.
- 2013: The claimant earned $14,083.00
- 2014: The claimant earned $14,174.00.
- 2015: The claimant earned $6,760.00.
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The Claimant was clear he was an independent contractor. On page 33 of the transcript, the Claimant testified he had been "self-employed for years." He explained he had his contractor's license for over 20 years. ***Tr. at 33***. He added he contracted to perform roofs noting he was "good" at roofs and liked doing work he was "comfortable" performing. ***Id.*** Thus, per the Claimant, he only advertised that he performed "roofing" jobs. ***Id. at 33-34.*** With respect to materials used to perform the roofing jobs as an independent contractor, the Claimant testified he used the exact same products listed on his affidavit. ***Id. at 63.***

With this in mind, in 2016, the Claimant earned $10,123.00 as an independent contractor performing roofing jobs. Thus, in 2016, the Claimant earned approximately 77.6% of his income as an independent contractor. In 2017, the Claimant earned approximately 81% of his income as an independent contractor. The Claimant had far more exposure to the alleged chemicals listed on his affidavit as a self-employed roofer than with CCRR. Moreover, there is a latency issue. Dr. Martin noted that the claimant's cancer was present for at least several months at a minimum to in April 2017. Further, the necessary latency period of 5-15 years would have required the Claimant's relevant exposure to be in at least 2012. To the contrary, the Claimant only began working for CCRR in 2016. As Dr. Martin noted this chronology is "incompatible with [the claimant's] diagnosis of MDS being causally related to exposures while he was employed by CCRR..." In Powell v. State Workmen's Compensation Commissioner, 166 W. Va. 327, 273 S.E.2d 832 (1980), the West Virginia Supreme Court of Appeals stated, "Unlike traumatic injuries, the causal connection

for occupational diseases must be establishes by showing exposure at the workplace ***sufficient*** to cause the disease and that the disease actually resulted in the particular case." ***Id,, at 336, 273 S.E.2d at 837 (1980).*** The BOR did not take into account the sufficiency and duration of the Claimant's purported exposure to solvents during his abbreviated and sporadic employment at CCRR. Therefore, the Claimant did not meet the satisfy the elements of an occupational disease and the BOR erred in finding he did.

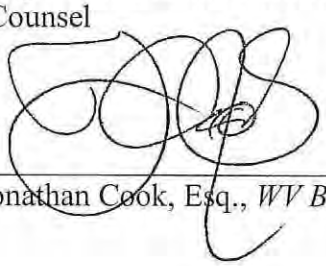
Finally, Dr. Martin provided a credible opinion that the Claimant's MDS was unrelated to solvent exposure and was most likely random as is the case with the vast majority of MDS cases. The Claimant did not help himself as he has a significant smoking history having started at age 17. He did not quit until 51 or so. Under the circumstances of this case,

VII. CONCLUSION

Based on the facts of this claim, the evidence of record, and the arguments as set forth REVERSE the Board of Review decision dated August 2, 2022, and REINSTATE the Claims Administrator's order dated June 26, 2019, DENYING myelodysplastic syndrome as a compensable occupational disease in this claim.

Respectfully submitted,

Chaney's Construction Renovations and Rentals
By Counsel



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