

BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

No. 23 - _____

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**KERMIT COLES (DECEASED)
WANDA COLES, WIDOW**

PETITIONER,

V.

**CENTURY ALUMINUM OF
WEST VIRGINIA INC, EMPLOYER.**

RESPONDENT,

BRIEF IN SUPPORT OF APPEAL

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ASSIGNMENTS OF ERROR

The Board of Review erred in finding that the Claimant had not met her burden of proof to show that her husband suffered death caused by an occupational disease, where she offered evidence of exposure, an expert opinion, and supporting scientific studies of the link between exposure to polycyclic aromatic hydrocarbons and bladder cancer, under *Bradford v. Workers' Compensation Comm'r*, Syl. Pt. 3, 185 W.Va. 434, 408 S.E.2d 13 (1991).

The Board of Review erred in failing to properly apply the holding in *Powell v. State Workmen's Compensation Commissioner*, 166 W.Va. 327, 273 S.E.2d 832 (1980) that W.Va. Code § 23-4-1 does not require the claimant to prove the conditions of his or her employment were the exclusive or sole cause of the disease nor does it require the claimant to show that the disease is peculiar to one industry, work environment, or occupation.

The Board of Review erred in finding that the Decedent's exposure was limited without the Employer making any findings regarding exposure, and was clearly wrong in light of the evidence offered by affidavit, social security earnings report, medical records, and expert report.

STATEMENT OF THE CASE

This is the appeal from an adverse decision of the Workers Compensation Board of Review Entered February 2, 2023, affirming the order of the Third Party Administrator's Order dated September 22, 2020, which rejected the application of the Claimant for widow's and dependents' benefits. Appendix 000251 – 000252.

The Claimant filed a claim for widow's and dependents' benefits stating that the Claimant's Decedent suffered from bladder cancer caused or contributed to by exposure to polycyclic hydrocarbons in the course of his employment. The date of death was January 14,

2020. The cause of death is listed as metastatic urothelial cancer (bladder cancer.) Appendix 000165 – 000166.

The Claimant submitted evidence that Decedent was employed at Kaiser Aluminum/Century Aluminum from 1988 to 2007. Appendix 000001 – 000009. The Claimant submitted an affidavit from Patrick Coles, who worked with his father from 1986 to 1988, which stated that:

1. That his name is Patrick Coles and his address is 170 Nellie Lane, Charleston, West Virginia, 25320.
 2. His parents are Kermit Coles, deceased, and Wanda Coles.
 3. His birthday is September 19, 1972.
 4. He is currently employed as a firefighter and EMT for the City of Charleston.
 5. That he lived with his parents until adulthood.
 6. That he is familiar with his father's work from living with him and from working with him for two years, during which time the facility was Century Aluminum.
 7. That his father worked in plant maintenance and also was assigned to the pot room as a maintenance worker on a regular basis after returning to work following the lock out.
 8. That the affiant was also employed at the aluminum plant for two years in the 1996 to 1998 period, when he was employed as protection (security), fire fighter and EMT.
 9. That in that two year period he would visit his father Kermit in the pot room and observe him present in the pot room, where the metal were mixed.
 10. That based on his personal observation and conversations with his father, Kermit Coles was employed in the pot room on a regular basis throughout his years of employment, and continuously after the lockout.
 11. That his father was present in the pot room while metals were being melted and molten product was being produced.
- Appendix 000178 – 000180.

The Claimant offered in evidence the Social Security Earnings Report, which documents years of employment at the Employer. Appendix 000010 – 000014. The medical records include a reference to the Decedent's work and smoking history: Patient is a 69-year-old Caucasian male with one episode of gross hematuria in June, history of smoking and tobacco use, history of

occupational exposure to chemicals and hematospermia which has also resolved. Appendix 000036 – 000042 (CAMC Urology page 46). The medical records state that the Decedent smoked for 42 years, quitting in 2007. Appendix 000080 – 000086 (Mayo Clinic 286)

The Claimant offered a report from Dr. Werntz dated April 21, 2021, which summarized his work history as follows:

Work history:

1966 - 1972: US Army-truck driver-stationed at Fort Leonard Wood, Fort Ord, and in Germany.

1972 - 1980: Construction Plumber and Pipefitter (Trade Union – multiple worksites and employers)

1980 - 2007: Millwright, Maintenance, and Welder - Kaiser / Century I Ravenswood Aluminum

Appendix 000181 – 000186.

Dr. Werntz concluded:

Assessment of causation is the key factor in this matter. The best accepted approach is to use Hill's criteria. While several aspects apply only to populations, there are several aspects of Hill's Criteria that were assessed in assessing causation on this individual.

Temporality - Mr. Coles developed bladder cancer after exposure to the aluminum production activities, and with an appropriate latency period between the onset of exposure and development of disease.

Biologic Plausibility - There is a robust literature associating Bladder Cancer with PAH exposure, as well as exposure in aluminum production facilities.

Specificity & Consistency - The IARC monograph notes an association between aluminum production facilities and bladder and lung cancers, specifically. This claimant suffered from Bladder Cancer, one of these specific cancers.

MEDICAL OPINION

Mr. Coles' medical records clearly document that this gentleman was diagnosed with invasive bladder cancer in 2019 and died from his bladder cancer in early 2020. Mr. Cole worked for 27 years in an aluminum production facility as a millwright, welder, and

maintenance person. Together these jobs would have had him spending most or all of his time in the aluminum production areas. It is my medical opinion that Mr. Coles' development of bladder cancer was significantly contributed to by his working in an aluminum production facility, including the potroom. Based upon the literature, it is my opinion that his risk of developing bladder cancer was significantly increased by his work in an aluminum production facility over what his risk would have been from smoking habit alone. It is my further opinion that without this additional risk from the aluminum manufacturing exposures it is less likely that he would have developed bladder cancer, the ultimate cause of his death.

STANDARD OF REVIEW

The standard of review is set forth in West Virginia Code § 23-5-12a(b) (2022), in part, as follows:

The Intermediate Court of Appeals may affirm the order or decision of the Workers' Compensation Board of Review or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the Workers' Compensation Board of Review, if the substantial rights of the petitioner or petitioners have been prejudiced because the Board of Review's findings are:

- (1) In violation of statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the Board of Review;
- (3) Made upon unlawful procedures;
- (4) Affected by other error of law;
- (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.

SUMMARY OF ARGUMENT

As set forth below in more detail, the Claimant contends that she showed by affidavit and report of Dr. Wertz that the Decedent had exposure to the hazards of occupational disease - bladder cancer. The report of Dr. Werntz is well reasoned, based on a review of the relevant medical records, IARC statements regarding exposure to polycyclic hydrocarbons, and by application of the relevant Hill criteria to the case. The Claimant submitted in further support of

her claim a medical review of the literature regarding the occurrence of bladder cancer in aluminum smelter workers. The BOR erred in failing to accord weight to the opinion of Dr. Werntz, and to properly apply the holding of *Bradford* and *Powell*, supra.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument will significantly aid the decisional process with regard to the application of the law to the facts and standards of appeal at issue.

ARGUMENT

THE OFFICE OF JUDGES AND THE BOARD OF REVIEW ERRED IN APPLYING *BRADFORD V. WORKERS' COMPENSATION COMM'R*, Syl. Pt. 3, 185 W.Va. 434, 408 S.E.2d 13 (1991), WHICH STATES THAT THE CLAIMANT IS ONLY REQUIRED TO PROVE THAT AN OCCUPATIONAL INJURY OR DISEASE CONTRIBUTED IN ANY MATERIAL DEGREE TO THE DEATH, AND *POWELL V. STATE WORKMEN'S COMPENSATION COMMISSIONER*, 166 W.VA. 327, 273 S.E.2D 832 (1980) WHICH HOLDS THAT A CLAIMANT IS NOT REQUIRED TO PROVE THAT AN OCCUPATIONAL EXPOSURE WAS THE SOLE OR EXCLUSIVE CAUSE OF THE DISEASE

In *Bradford v. Workers' Compensation Comm'r*, Syl. Pt. 3, 185 W.Va. 434, 408 S.E.2d 13 (1991), the Court held that in order to establish entitlement to dependent's benefits, a claimant must show that an occupational disease or injury "contributed in any material degree to the death."

The evidence shows that the Werntz report exceeded the standard required by *Bradford*. Here, the Claimant showed that the Decedent worked in an environment characterized by the presence of polycyclic aromatic hydrocarbons. As Dr. Werntz reported, the IRC has identified these as human health hazards.

Dr. Werntz applied the well accepted principals to support his conclusions.

The West Virginia Workers Compensation Statute provides the following definition of disease:

(f) For the purposes of this chapter, occupational disease means a disease incurred in the course of and resulting from employment. No ordinary disease of life to which the general public is exposed outside of the employment is compensable except when it follows as an incident of occupational disease as defined in this chapter. Except in the case of occupational pneumoconiosis, a disease is considered to have been incurred in the course of or to have resulted from the employment only if it is apparent to the rational mind, upon consideration of all the circumstances: (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...

W. Va. Code 23-4-1(f).

As the BOR decision notes, a 2014 study supports a finding of an increased risk for bladder cancer in “pot room” workers which showed a strong association with bladder cancer, but not in the United States. The BOR found the report more persuasive because there was no evidence of the length of exposure and the nature of the process. The BOR decision is clearly wrong in its findings regarding the study, which is in the record, and the Decedent’s work history.

Here, the records clearly show that the Decedent had 27 years of work. The affidavit from the son states that based on his personal observation and conversations with his father, Kermit Coles was employed in the pot room on a regular basis throughout his years of employment, and continuously after the lockout:

11. That his father was present in the pot room while metals were being melted and molten product was being produced.

As set forth by Dr. Werntz, the issue is the exposure to fumes from melted and molten product, which was shown for Mr. Coles for many years. The distinction drawn by the BOR regarding the application of the study is clearly wrong. Under the description of the study by the Employer's expert, regarding the strong association of bladder cancer with pot room workers, the Claimant should be awarded benefits.

It is worth quoting at length the 2014 report, in light of the reliance of the BOR¹:

Coal tar pitch volatiles have been prominent agents for investigation in potrooms and carbon plants. More than 100 PARs have been identified in primary aluminum smelters, and most derive from the coal tar used as a binder in the carbon anodes.⁶ The composition of the anodes varies, with 25% to 30% pitch mixed with calcined petroleum coke, with proportions depending on raw material properties. The pitch contains as much as 20% PARs, and 19 PARs have been commonly found in the air of aluminum smelters, which included one established human carcinogen, one probable carcinogen, and seven PARs classified as possible human carcinogens (as of April 2013 according to the International Agency for Cancer Research [IARC]. Appendix 000015 – 000035 study page s40.

The study also notes that there are multiple sources of emissions from the smelting of alumina:

Both CTPVs and PARs arise mainly from the electrodes, but potroom emissions also derive from the cryolite baths (which contain aluminum salts with fluorides), from the alumina (aluminum oxide and various elements), and from other operations during the smelting process. Reported exposures are varied: aluminum fluorides, fibrous sodium aluminum tetrafluoride particles, calcium fluoride, sulfur dioxide, carbon monoxide and dioxide, chlorine gas, trace metals (eg, beryllium, cadmium, chromium, copper, vanadium, mercury,

¹ The study clearly states, "While the processes used in various countries are essentially the same, raw material sources and the operating conditions in the various plants are likely to differ. In view of this, it was considered useful to examine what is known about cancer risks in various countries and then to combine the experience to better understand what risks exist overall in the primary aluminum production industry. Table 2 summarizes the published cohort studies available, by country or continent of origin of the study, and Table 3 presents a summary of the associations found for selected types of cancer." Appendix 000015 – 000035 s43.

and nickel), silica, and phenols.^{5,22}

The study further states that there are larger measures of particles in the Soderburg process than the prebake process. This does not read no measures of particles in the prebake, and does not support the conclusion of the BOR.

The study concludes with regard to bladder cancer:

Bladder cancer: reasonably strong evidence (aluminum production) and limited evidence (CTPYs). There seems to be little doubt that when studies in Soderberg plants allow adequate follow-up time and workers have had adequate exposure in the potrooms, they are at an increased risk of bladder cancer. Indeed, there is evidence that bladder cancer is strongly associated with Soderberg potrooms in Canada and Norway, detected at statistically nonsignificant levels in the United States and France. Studies have shown that this risk increases with increasing exposure using the B(a)P index or BSM indices of exposure. In Quebec, the studies have also shown, in parallel with reducing B(a)P exposure, mortality and incidence of this cancer have reduced. These reductions may be related to earlier detection, better treatment, and reductions in exposure to B(a)P or agents correlated with this index, but the specific etiological factor remains unknown. Workers in the carbon plant were reported not to have an increased risk of bladder cancer,⁷¹ and in spite of long follow-up, there is no clear increase in bladder cancer incidence among Soderberg workers in Sweden. Comparison of raw materials and operating conditions may be useful. As bladder cancers are often associated with amines or nitro so compounds, these have been proposed as etiological factors, but studies have shown the potential for exposure to any significant quantity of these to be small, although plausible.⁸⁶ Another possible explanation is an indirect dehydrating effect of heat on urine concentration. There is evidence that persons who drink large quantities of fluid are at a reduced risk of bladder cancer,⁸⁷ and this has been linked to frequency of urination.⁸⁸ Potroom work in the past involved considerable exposure to heat, a hazard that has reduced in parallel with B(a)P concentrations. Smoking has also been linked to bladder cancer risk, but while contributing to the risk, it does not totally explain the excess risk in CTPV-exposed workers. The jury on the specific etiological factor in bladder cancer is still out.

Soot and coal tar pitch have been associated with limited human

evidence to bladder cancer.⁸⁵ This evidence comes in large part from the aluminum industry studies. Appendix 000015 – 000035 study page s57.

In fact, the study concluded that,

It is now clear that cancers of the lung and the bladder are associated with work in most Soderberg potrooms, and there are indications that prebake plants should be further investigated for these cancers taking into account smoking and excluding carbon plants. Cancer incidence studies are preferable as some causes such as bladder cancer do not always result in death and other outcomes may not be detected using mortality only. Furthermore, it is preferable to find any cancer excess as early as possible so that preventive actions might reduce future risks.

The BOR decision mischaracterizes the study:

The 2014 study by Gibbs and Labreche regarding the increased risk of bladder cancer in aluminum workers, was discussed' by both Dr. Werntz and Dr. Lultschik. Dr. Lultschik relied on this report to support her conclusion that it is more likely than not that the employee's bladder cancer was not caused by his employment at Century. In this regard, she noted that she did not have quantitation of the hours of exposure to CTPV per day or week during the employee's time of employment and there was no information regarding whether Century used the pre bake process or the older Soderberg process. **Dr. Lultschik further indicated that Gibbs and Labreche noted that studies in Soderberg potrooms from Canada and Norway show a strong association of exposure with bladder cancer, but that bladder cancer was detected at statistically nonsignificant levels in the United States.**

Dr. Lultschik provides more specifics about the 2014 study and the distinction in the risks for exposure to carcinogens between the "prebake" and the "Soderberg" processes. The evidence does not show which process was used by Century during the employee's time at Century, and there is no evidence regarding the extent of the employee's exposure to CTPV. Accordingly, Dr. Lultschik's report is more detailed and persuasive than the report by Dr. Werntz.

The fact that the employee worked in the aluminum plant is not alone sufficient to establish causation of his bladder cancer. Although the claimant does not have to establish that the conditions of the employee's employment were the exclusive or sole cause of the disease, she has not shown a direct causal connection between the employee's work and his development of bladder cancer. The claimant has not met her burden of proof. The order of September 22, 2020, is affirmed.

As set forth above, the study supports the clear conclusion that exposure to smelting aluminum causes bladder cancer, due to the presence of PAH's and number other constituents of the material and equipment used in the process.

Crucially, the BOR decision does not address the discussion of the IARC report cited by Dr. Werntz:

Working in aluminum production has been determined by the International Agency for Research on Cancer (IARC) to be a class 1 - Known Human Carcinogen. IARC will periodically update their assessments, and their most recent review of current data and opinion on cancer in aluminum production workers is found in Monograph 100F-22 (2018) 1. They concluded:

There is sufficient evidence in humans for the carcinogenicity of occupational exposures during aluminum production. Occupational exposures during aluminum production cause cancer of bladder, and of the lung.

Dr. Werntz stated,

Reading IARC Monograph 100F-22 carefully, there are several key points relevant to this claimant. First is that their conclusions reflect the entirety of aluminum production, and that there is insufficient data to identify specific individual exposures, aspects of aluminum production, or particular chemical agents that are causative. Second, that there are several apparent carcinogens present in aluminum production, including PAH, potroom dust, and benzo(a)pyrene. In studies of exposed workforces, the elevated bladder cancer risk was seen across the production activities. Finally, several Canadian studies of aluminum workers they note that the elevated risk of bladder cancer persists, even when corrected for smoking status. Appendix 000181 – 000186.

Under *Powell*, the Claimant is not required to prove that Decedent's exposure was the sole or exclusive cause of his disease. *Powell* states:

The employer's argument on the burden of persuasion in an occupational disease case is also unavailing. First, this contention is not supported by the statutory language. W. Va. Code § 23-4-1 does not require a claimant to prove that the conditions of his employment were the exclusive or sole cause of the disease nor does it require the claimant to show that the disease is peculiar to one industry, work environment, or occupation. Although evidence pertaining to cigarette smoking may be relevant in determining whether the statutory standards have been met, the claimant need not negative all possible non-occupational causes of

the disease. We rejected that argument in Syllabus Point 1 of *Myers v. State Workmen's Compensation Comm'r.*, supra, where we held:

A claimant in a workmen's compensation case must bear the burden of proving his claim but in doing so it is not necessary to prove to the exclusion of all else the casual connection between the injury and the employment. Syl. pt. 2, *Sowder v. State Workmen's Compensation Comm'r.*, 155 W. Va. 889, 189 S.E.2d 674 (1972).

The effect of the BOR decision regarding the exposure required of the Decedent is to disregard both *Powell* and *Bradford*. The evidence offered by the Claimant was that the Decedent had exposure to fumes from molten aluminum in the “pot room.” There was no evidence offered by the Employer to contradict the evidence of exposure offered by the Claimant. The Decedent worked in that environment for 27 years. The comments in the 2014 review article were not that bladder cancer could not occur in non-Sonderburg pot rooms, but that there appeared to be varying risks reflected in the literature. Nevertheless, the conclusion was clear that the operative cause was the particulate from the smelting process which includes numerous polycyclic aromatic hydrocarbons. The BOR did not accurately read the 2014 report, which was part of the record. Further, it accorded facts not in evidence, i.e. the lack of exposure, to the benefit of the Employer.

THE BOARD OF REVIEW ERRED IN FINDING THAT THE DECEDENT’S EXPOSURE WAS LIMITED WITHOUT THE EMPLOYER MAKING ANY FINDINGS REGARDING EXPOSURE, AND WAS CLEARLY WRONG IN LIGHT OF THE EVIDENCE OFFERED BY AFFIDAVIT, SOCIAL SECURITY EARNINGS REPORT, MEDICAL RECORDS, AND EXPERT REPORT

Finally, the notice to the Claimant did not contain specific findings regarding exposure.

The denial states,

We are the Third-Party Administrators handling claims for Century Aluminum. Your application for dependent benefits is denied as there is **not sufficient medical evidence** to establish a connection between the decedent’s condition and his employment.

Claims Decision, September 22, 2020. Appendix 000251 – 000252.

The Third Party Administrator in this case was required to meet the following provision of West Virginia CSR §85-1-7. Notice and Litigation.

7.2. Upon the making of any decision, the responsible party shall send all parties a written notice of the decision, **setting forth the decision and the basis thereof**, and informing the claimant or claimant's dependants of the right to protest the decision by filing a protest with the Office of Judges within sixty (60) days of the receipt of the decision. Emphasis added.

The denial was clearly based on medical causation and not exposure. Under the statute, the employer is required to make specific findings of exposure.² Here, the employer did not do so, and therefore failed to give the claimant adequate notice of exposure as an issue, as opposed to “medical causation.” The employer waived any objection to the claim based on exposure. The Claimant had no fair notice regarding this issue and opportunity to respond. The decision of the Board of Review should therefore be set aside. In basing the decision on exposure, where the denial did not state that lack of exposure was a basis for the decision, the BOR violated statutory provisions, and failed to accord the claimant a fair opportunity to respond.

The Supreme Court has held that procedural due process attaches to a statutory disability program:

The fundamental point in *Mathews* was that the creation of a statutory disability benefit program by the government provides to those receiving the benefit a property entitlement which triggers certain procedural due process protection. We have recognized similar procedural due process protections where government action impairs or terminates a property or liberty interest. State ex rel. *McLendon v. Morton*, W.Va., 249 S.E.2d 919 (1978); *Waite v. Civil Service Commission*, W.Va., 241 S.E.2d 164 (1977); *North v. West Virginia Board of Regents*, W.Va.,

² “Provided, That compensation is not payable for an occupational disease or death resulting from the disease unless the employee has been exposed to the hazards of the disease in the State of West Virginia over a continuous period that is determined to be sufficient, by rule of the board of managers, for the disease to have occurred in the course of and resulting from the employee’s employment. An application for benefits on account of an occupational disease shall set forth the name of the employer or employers and the time worked for each. The commission may allocate to and divide any charges resulting from the claim among the employers by whom the claimant was employed. The allocation shall be based upon the time and degree of exposure with each employer.” W. Va. Code 23-4-1(f)

233 S.E.2d 411 (1977). Citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). *Mitchell v. State Workmen's Compensation*, 256 SE 2d 1.

Here, the claimant was entitled to rely on the finding of the Third Party Administrator that the issue was medical and not exposure. The Order of the BOR therefore to the extent that it is based on the issue of exposure is clearly wrong and should be reversed.

CONCLUSION

The Board of Review 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.
- W. V. Code §23-5-12(b)

In the words of W.Va. Code § 23-4-1g (2003) this claim had merit. The BOR was clearly wrong in failing to rule in the Claimant's favor and reverse the decision of the Third Party Administrator.

The decision of the BOR was in violation of statutory provisions and in excess of authority and jurisdiction by disregarding the evidence of record, including the 2014 study and the reference IARC, which was cited by both Dr. Werntz and the 2014 study.

The BOR decision was clearly wrong in that the Claimant offered evidence of exposure, and such exposure was indeed confirmed by the affidavit filed by the Claimant, the information

in the records and reports, and the Social Security Earnings report regarding the Decedent's past work.

The BOR decision failed to follow the case of *Powell* and *Bradford* as cited by the Claimant above, and held the Claimant to a higher standard than required by law.

The decision taken as a whole was arbitrary and capricious.

The order of the Board of Review should be reversed and the claim remanded for entry of an order awarding benefits, and such further relief as the Court may deem appropriate. In the alternative, the claim should be remanded for development of evidence regarding the issues.

**Petitioner,
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