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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

ROCKSPRING DEVELOPMENT, INC.,

Petitioner,

v.

RANDY BROWN,

Respondent.

Supreme Court No.: 22-0135

Appeal No.: 2057120

JCN: 2016017091

DLE: 2/5/13

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**PETITION FOR APPEAL ON BEHALF OF
PETITIONER, ROCKSPRING DEVELOPMENT, INC.**

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ASSIGNMENTS OF ERROR

- I. THE WORKERS' COMPENSATION BOARD OF REVIEW'S ORDER DATED JANUARY 21, 2022, SHOULD BE REVERSED BECAUSE IT RESULTS FROM ERRONEOUS CONCLUSIONS OF LAW.
- II. THE WORKERS' COMPENSATION BOARD OF REVIEW HAS COMMITTED CLEAR LEGAL ERROR BY BASING ITS ORDER UPON THE OCCUPATIONAL PNEUMOCONIOSIS BOARD'S CLEARLY WRONG FINDING THAT THE CLAIMANT HAS A 50% PULMONARY IMPAIRMENT, DUE TO OCCUPATIONAL PNEUMOCONIOSIS, A FINDING THAT IS BASED UPON OBSOLETE, AND NO LONGER VALID, MEDICAL EVIDENCE.
- III. AS THE MEMBERS OF THE OCCUPATIONAL PNEUMOCONIOSIS BOARD HAVE ADMITTED UNDER OATH, THE CLAIMANT DOES NOT CURRENTLY HAVE OCCUPATIONAL PNEUMOCONIOSIS OR ANY PULMONARY IMPAIRMENT, FOLLOWING A DOUBLE LUNG TRANSPLANT SURGERY, AND, THEREFORE, THE WORKERS' COMPENSATION BOARD OF REVIEW HAS COMMITTED CLEAR LEGAL ERROR BY AFFIRMING A DECISION THAT AFFIRMED AN ORDER GRANTING THE CLAIMANT A 20% PERMANENT PARTIAL DISABILITY AWARD, IN ADDITION TO A 30% AWARD GRANTED PREVIOUSLY IN THIS OCCUPATIONAL PNEUMOCONIOSIS CLAIM.

NATURE OF PETITION FOR APPEAL

Petitioner, Rockspring Development, Inc. (“the employer”), by counsel, petitions for appeal from the Workers’ Compensation Board of Review’s order dated January 21, 2022, which affirmed the Decision of Administrative Law Judge dated June 28, 2021, which affirmed the claims administrator’s order dated December 6, 2018, which granted Respondent, Randy Brown (“the claimant”), a 20% permanent partial disability (“PPD”) award, in addition to the 30% PPD previously awarded in this occupational pneumoconiosis claim. The order entered below, which is based upon the hearing testimony of the Members of the Occupational Pneumoconiosis Board (“the O.P. Board”), is clearly wrong, as the claimant no longer has occupational pneumoconiosis or any measurable pulmonary impairment, and the O.P. Board admits that this is the case. The employer, by counsel, respectfully requests that the Workers’ Compensation Board of Review’s order be reversed, and that the claimant be granted no PPD award, in addition to the 30% PPD award previously granted in this occupational pneumoconiosis claim.

STATEMENT OF THE CASE

On September 25, 2018, the O.P. Board, which was comprised of Drs. Johnsey L. Leef III, a radiologist, Chairman Jack L. Kinder, and Mallinath Kayi, examined and tested the claimant and reviewed some of the claimant’s medical records and claim filings (see the O.P. Board’s Findings dated September 25, 2018; Petitioner’s Appendix, Exhibit A). The O.P. Board noted that the claimant was 62 years old and had worked as a coal miner for 38 years, but had retired from work in February 2013, due to a shoulder injury. In addition, the O.P. Board reported that the claimant had been diagnosed with both asthma and chronic obstructive pulmonary disease (“COPD”) in 2015, and placed on a lung transplant waiting list beginning in 2015, due to progressive massive fibrosis

(PMF).

The O.P. Board compared x-rays taken of the claimant's chest on August 16, 2016, and September 25, 2018, and stated that both sets of x-rays revealed nodular fibrosis consistent with occupational pneumoconiosis with areas of coalescence in the perihilar regions bilaterally. Further, the O.P. Board reported that the areas of coalescent opacity had increased slightly from August 16, 2016, to September 25, 2018, and were consistent with "progressive massive pulmonary fibrosis."

The O.P. Board's examination of the claimant on September 25, 2018, revealed "increase effort of breathing" and "bilateral coarse breath sounds with dry rales noted scattered throughout both lung fields." Although the claimant's pulmonary function was tested at the CAMC Occupational Lung Center on September 25, 2018, these test results were invalid, as indicated by asterisks contained in the test report (Id.). Consequently, the O.P. Board based its impairment recommendation (a total of 50%) upon the results of pulmonary function testing of the claimant at Vanderbilt University Medical Center on October 18, 2017, which included a forced expiratory volume in one second ("FEV₁")/forced vital capacity ("FVC")% of 52, representative of almost a 50% pulmonary impairment, pursuant to W. Va. C.S.R. TABLE § 85-20A, Impairment of Pulmonary Function (2006) (see Petitioner's Appendix, Exhibits A & B). The O.P. Board correctly noted that the claimant had been previously granted a 30% PPD award in the instant claim in 2016, so it recommended an additional 20% pulmonary impairment, due to occupational pneumoconiosis, on September 25, 2018 (see Petitioner's Appendix, Exhibit A).

By order dated December 6, 2018, HealthSmart Casualty Claims Solutions, now known as, SmartCasualtyClaims ("the claims administrator"), granted the claimant a 20% PPD award, in addition to the 30% PPD award previously granted in the instant claim, based upon the O.P. Board's

Findings dated September 25, 2018 (see Petitioner's Appendix, Exhibit C). The employer, by counsel, protested the claims administrator's order dated December 6, 2018.

During protest litigation and long after the employer's deadline for evidentiary development had expired, the claimant underwent a bilateral lung transplant surgery at Vanderbilt University Medical Center on May 3, 2020, which was authorized and paid for by the employer in the instant claim. The employer, by counsel, subsequently received Vanderbilt University Medical Center's records regarding the claimant's post-operative care, and moved the Workers' Compensation Office of Judges ("the Office of Judges") to admit into evidence, Vanderbilt University Medical Center Adult's records dated August 3, 2020 (see Petitioner's Appendix, Exhibit D). The Office of Judges granted the employer's motion, per order dated November 4, 2020.

Vanderbilt University Medical Center Adult's records include a report of two x-rays taken of the claimant's chest on August 3, 2020. Dr. Kim Lori Sandler reported that these x-rays revealed post-operative changes of the claimant's double lung transplant, without evidence of an acute cardiopulmonary process.

Also included in Vanderbilt University Medical Center Adult's records are the detailed results of pulmonary function testing of the claimant on August 3, 2020 (see page 1), and summaries of the results of pulmonary function testing of the claimant on 10 dates following the double lung transplant surgery of May 3, 2020 (see page 2). The results of pulmonary function testing of the claimant on August 3, 2020, include an FVC of 97% of predicted, an FEV₁ of 101% of predicted, and an FEV₁/FVC% of 78, all of which are well within normal limits and representative of a 0% pulmonary impairment, pursuant to W. Va. C.S.R. TABLE § 85-20A, Impairment of Pulmonary Function (2006). In fact, the summaries of the results of pulmonary testing of the claimant on all of

the following dates, including the dates of the last six tests, are within normal limits and represent a 0% pulmonary impairment, pursuant to W. Va. C.S.R. TABLE § 85-20A, Impairment of Pulmonary Function (2006): June 1, 2020, June 15, 2020, June 22, 2020, June 29, 2020, July 8, 2020, July 20, 2020, and August 3, 2020 (Id.).

An O.P. Board hearing was scheduled for March 3, 2021, but the Members of the O.P. Board admitted to not know as to what to recommend in this unusual and complex claim, so the final O.P. Board hearing was rescheduled for May 5, 2021. Three members of the O.P. Board testified at the hearing held on May 5, 2021 (see Petitioner's Appendix, Exhibit E). Dr. John Willis, the O.P. Board's radiologist present at the hearing, testified that he had interpreted the x-ray taken of the claimant's chest at Vanderbilt University Medical Center Adult on August 3, 2020, as revealing post-surgical changes consistent with a double lung transplant surgery, but no evidence of occupational pneumoconiosis (see Exhibit E at 3-4). Dr. Willis added that he made the finding of fact that there was insufficient evidence of occupational pneumoconiosis on the claimant's chest x-ray dated August 3, 2020, upon which to diagnose this disease (TR. 4). Moreover, Dr. Willis confirmed that the x-ray evidence of occupational pneumoconiosis/progressive massive pulmonary fibrosis depicted by the x-ray taken of the claimant's chest on September 25, 2018, was no longer visible on the claimant's chest x-ray dated August 3, 2020 (Id.). Chairman Kinder and Dr. Bradley Henry, who were also present at the hearing, testified that they agreed with Dr. Willis' x-ray findings (TR. 5 & 13).

Dr. Kinder confirmed that the claimant had been awarded a 30% PPD for pulmonary impairment, due to occupational pneumoconiosis, in 2016, and that the O.P. Board had recommended an additional 20% pulmonary impairment on September 25, 2018 (TR. 5). He

confirmed further that the results of the O.P. Board's spirometry a/k/a pulmonary function testing of the claimant on September 25, 2018, were "not reproducible, not acceptable" and invalid for determining the claimant's pulmonary impairment (TR. 6). In addition, Dr. Kinder confirmed that the O.P. Board's finding of a 50% pulmonary impairment (i.e., an additional 20% pulmonary impairment) on September 25, 2018, had been based upon the results of pulmonary function testing of the claimant at Vanderbilt University on October 18, 2017, specifically, the FEV₁/FVC% of 52 (Id.).

Regarding the results of pulmonary function testing of the claimant at Vanderbilt University Medical Center Adult on August 3, 2020, Dr. Kinder confirmed that such results were within normal limits, and represented no permanent pulmonary impairment (TR. 7-8). Dr. Kinder also acknowledged that the claimant's pulmonary function had improved in between May 20, 2020, and August 3, 2020, following the claimant's double lung transplant surgery (TR. 8). Although the x-ray taken of the claimant's chest on August 3, 2020, and the results of pulmonary function testing of the claimant on August 3, 2020, were entirely normal, Dr. Kinder continued to find that the claimant had sustained a 50% pulmonary impairment, due to (now nonexistent) occupational pneumoconiosis, based upon Vanderbilt University's pulmonary function test results of October 18, 2017 (TR. 9 & 12). Dr. Kinder attempted to explain his decision to base his impairment finding upon the old, pre-transplant medical evidence instead of the current medical evidence by stating that post-transplant, the claimant's life span may be shortened, and the claimant must take medications, which will cause an increased risk of advanced coronary disease and skin cancer and other issues (TR. 9-11). However, Dr. Kinder admitted that he was not a "transplant surgeon" or a "transplant doctor" and that he was unable to determine whether the claimant's life would be shortened versus what it had

been before the claimant underwent double lung transplant surgery (TR. 10 & 12). Dr. Henry agreed with Dr. Kinder's testimony, as well as Dr. Willis' testimony, in the instant claim (TR. 13).

By Decision of Administrative Law Judge dated June 28, 2021, the Office of Judges affirmed the claims administrator's order dated December 6, 2018, which granted the claimant a 20% PPD award, in addition to the 30% PPD award previously granted in the instant claim, based upon the following cursory finding: "The findings of the Occupational Pneumoconiosis Board are not clearly wrong. The claimant has a total of 50% whole person impairment, 20% beyond his previous award. The December 6, 2018 Order should be affirmed (see Petitioner's Appendix, Exhibit F). The employer, by counsel, appealed from the clearly wrong Decision of Administrative Law Judge dated June 28, 2021.

By order dated January 21, 2022, the Workers' Compensation Board of Review ("the Board of Review") affirmed the Decision of Administrative Law Judge dated June 28, 2021, which affirmed the claims administrator's order dated December 6, 2018, which granted the claimant a 20% PPD award, in addition to the 30% PPD award previously granted in the instant claim (see Petitioner's Appendix, Exhibit G). The employer, by counsel, petitions for appeal from the Board of Review's order dated January 21, 2022.

SUMMARY OF ARGUMENT

The Board of Review's order dated January 21, 2022, is clearly the result of erroneous conclusions of law. The Board of Review, as the Office of Judges had done, wrongly "rubber-stamped" the O.P. Board's ultimate finding that the claimant's pulmonary impairment, due to pneumoconiosis, was 50%, based upon an old x-ray taken of the claimant's chest and pulmonary function testing of the claimant at Vanderbilt University Medical Center on October 18, 2017.

However, the claimant underwent a double lung transplant surgery at Vanderbilt University Medical Center on March 3, 2020, and following this surgery, had normal appearing chest x-rays and normal pulmonary function, according to Vanderbilt University Medical Center's medical records. In fact, the O.P. Board admitted during the final hearing held herein on May 5, 2021, that by August 3, 2020, the claimant did not have x-ray evidence of occupational pneumoconiosis or any pulmonary impairment whatsoever. Instead of basing their ultimate finding upon the claimant's currently normal pulmonary status, however, the O.P. Board Members wrongly based their final recommendation upon an old chest x-ray, outdated pulmonary function study results, and concerns about what *might* happen to the claimant in the future. For all of the reasons, the Board of Review's order dated January 21, 2022, should be reversed, and the claimant should be granted no additional PPD award, based upon the fact that the claimant does not currently have occupational pneumoconiosis or any pulmonary impairment whatsoever.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Employer's counsel does not believe that oral argument is necessary in the instant claim.

ARGUMENT

The Board of Review's order dated January 21, 2022, is clearly wrong, and should be reversed. The standard of review applicable to this Honorable Court herein is as follows: "If the decision of the board represents an affirmation of a prior ruling by both the [claims administrator] and the office of judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the supreme court of appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law,

or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de-novo reweighing of the evidentiary record." W. Va. Code § 23-5-15(c) (2005). The Board of Review's order dated January 21, 2022, is clearly the result of erroneous conclusions of law, and not based upon the claimant's current status.

The Board of Review erroneously decided not to reverse the clearly wrong Decision of Administrative Law Judge dated June 28, 2021. The Board of Review shall reverse, vacate or modify a decision of an administrative law judge if the substantial rights of the appellant 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. Va. Code § 23-5-12(b) (2006). Further, "[f]or all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter shall be based upon a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. Under no circumstances will an issue be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position." W. Va. Code § 23-4-1g(a) (2003). The employer's substantial rights have been prejudiced by the decision of June 28, 2021, and the Board of Review's order affirming such decision, as such rulings

are in violation of statutory provisions and case law, and clearly wrong in view of the reliable, probative and substantial evidence on the whole record, as well as a preponderance of the evidence of record.

THE BOARD OF REVIEW'S ORDER DATED JANUARY 21, 2022, IS CLEARLY WRONG, AND SHOULD BE REVERSED, AS A PREPONDERANCE OF THE EVIDENCE OF RECORD CONCLUSIVELY ESTABLISHES THAT THE CLAIMANT NO LONGER HAS OCCUPATIONAL PNEUMOCONIOSIS OR ANY PULMONARY IMPAIRMENT.

The Board of Review clearly erred in affirming the Decision of Administrative Law Judge dated June 28, 2021, which was based upon the erroneous conclusion that the O.P. Board's ultimate finding of a 50% pulmonary impairment, due to occupational pneumoconiosis, was not clearly wrong. The O.P. Board correctly admitted under oath during the final hearing held on May 5, 2021, that after he had undergone a double lung transplant surgery (on May 3, 2020), the claimant did not have any x-ray evidence of occupational pneumoconiosis or any test evidence of permanent pulmonary impairment. More specifically, the x-rays taken of the claimant's chest at Vanderbilt University Medical Center Adult on August 3, 2020, and the results of pulmonary function testing of the claimant on August 3, 2020, which preponderate over all of the other/older evidence contained in the record, establish that the claimant no longer has occupational pneumoconiosis or any pulmonary impairment whatsoever. Moreover, the results of pulmonary function testing of the claimant on August 3, 2020, were not the only evidence of normal pulmonary function, as Vanderbilt University Medical Center Adult's summaries establish that the claimant also had exhibited normal pulmonary function during testing administered on all of these other dates: June 1, 2020, June 15,

2020, June 22, 2020, June 29, 2020, July 8, 2020, and July 20, 2020.

Instead of basing their ultimate impairment finding upon a preponderance of the evidence of record, the O.P. Board erroneously based its 50% pulmonary impairment recommendation on the stale and no longer valid results of pulmonary function testing of the claimant at Vanderbilt University on October 18, 2017, and the Office of Judges, then the Board of Review, committed clear legal error by “rubber-stamping” the O.P. Board’s clearly wrong decision in this regard. “The occupational pneumoconiosis board created pursuant to section eight-a [§ 23-4-8a] of this article shall premise its decisions on the degree of pulmonary function impairment that claimants suffer solely upon whole body medical impairment.” W. Va. Code § 23-4-6(i) (2005). Moreover, “West Virginia Code § 23-4-1 requires that one who claims workers’ compensation benefits for occupational pneumoconiosis must show: (1) the present existence of the disease or an aggravation of the disease which has been previously contracted and (2) exposure to the risk of occupational pneumoconiosis for a substantial period of time, including at least the specified minimum period of exposure while at work in West Virginia.” *Syl. Pt. 4, Marlin v. Bill Rich Construction, Inc.*, 198 W. Va. 635, 482 S.E.2d 620 (W. Va. 1997). In other words, the O.P. Board is supposed to recommend an impairment greater than 0% only when the claimant *presently* has occupational pneumoconiosis and currently has measurable pulmonary impairment, neither of which is the case in the instant claim.

The O.P. Board attempted to rationalize its erroneous decision to base its ultimate impairment rating upon old and no longer valid chest x-rays and pulmonary function study results by speculating as to what the claimant *might* experience in the future, as the result of having undergone a double lung transplant surgery. However, fear of what may happen in the future as the

result of coal-dust exposure is not compensable. “Under the definition and requirements for occupational pneumoconiosis claims set forth in W.Va. Code § 23-4-1 , it is not sufficient to prove only the fear of eventually contracting occupational pneumoconiosis or to show some exposure to contracting the disease for a period of time less than those periods set out in the statute.” *Syl. Pt. 5, Marlin v. Bill Rich Construction, Inc.*, 198 W. Va. 635, 482 S.E.2d 620 (W. Va. 1997). As noted above, the O.P. Board is required to premise its decision as to the degree of pulmonary impairment that a claimant suffers *solely* upon whole body medical impairment, pursuant to W. Va. Code § 23-4-6(I) (2005). In the instant claim, the O.P. Board based its ultimate impairment rating upon speculation, fear, and outdated/no longer valid medical evidence, as opposed to the claimant’s current pulmonary impairment, which is 0%, and the claimant’s normal chest x-rays. In doing so, the O.P. Board was clearly wrong, and the Office of Judges, then the Board of Review, committed clear and reversible error by “rubber-stamping” the O.P. Board’s obviously incorrect recommendation.

CONCLUSION

The O.P. Board was clearly wrong in recommending a 50% pulmonary impairment based upon outdated and no longer valid pulmonary function study results and x-ray findings, and the Office of Judges, then the Board of Review, committed clear legal error by basing their rulings upon this clearly wrong recommendation. A preponderance of the evidence of record herein conclusively establishes that the claimant no longer has occupational pneumoconiosis or any pulmonary impairment. For these reasons, the Board of Review’s order dated January 21, 2022, which affirmed the Decision of Administrative Law Judge dated June 28, 2021, which affirmed the claims administrator’s order dated December 6, 2018, which granted the claimant a 20% PPD award in

addition to the 30% PPD award previously granted in the instant claim, should be reversed, and an order granting the claimant no additional PPD award should be entered.

Respectfully submitted,

ROCKSPRING DEVELOPMENT, INC.

By counsel



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Appeal No.: 2057120
JCN: 2016017091
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CERTIFICATE OF SERVICE

I, Sean Harter, do hereby certify that on this 16th day of February, 2022, I served a true copy of each of the foregoing, "Petition for Appeal on Behalf of Petitioner, Rockspring Development, Inc." and "Petitioner's Appendix of Exhibits," by depositing the same in the United States mail, first class, postage prepaid, addressed to the following:

Edwin H. Pancake, Esquire
Maroney, Williams, Weaver & Pancake, PLLC
Post Office Box 3709
Charleston, WV 25337



Sean Harter

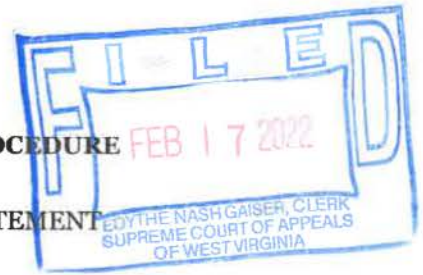
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22-0135

APPENDIX B – REVISED RULES OF APPELLATE PROCEDURE

WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT



Complete Case Title: Rockspring Development, Inc. v. Randy Brown
Petitioner: Rockspring Development, Inc. Respondent: Randy Brown
Counsel: Sean Harter Counsel: Edwin H. Pancake
Claim No.: 2016017091 Board of Review No.: 2057120
Date of Injury/Last Exposure: 2/5/2013 Date Claim Filed: 1/6/2016
Date and Ruling of the Office of Judges: 6/28/2021
Date and Ruling of the Board of Review: 1/21/2022
Issue and Relief requested on Appeal: Reversal of order granting an additional 20% PPD award for occupational pneumoconiosis is requested.

CLAIMANT INFORMATION

Claimant's Name: Randy Brown
Nature of Injury: Occupational pneumoconiosis
Age: 66 Is the Claimant still working? ☐ Yes ☒ No. If yes, where: _____
Occupation: Coal miner No. of Years: 38
Was the claim found to be compensable? ☒ Yes ☐ No If yes, order date: 3/31/2016

ADDITIONAL INFORMATION FOR PTD REQUESTS

Education (highest): _____ Old Fund or New Fund (please circle one)
Date of Last Employment: _____
Total amount of prior PPD awards: _____ (add dates of orders on separate page)
Finding of the PTD Review Board: _____

List all compensable conditions under this claim number: Occupational pneumoconiosis
(Attach a separate sheet if necessary)

Are there any related petitions currently pending or previously considered by the Supreme Court?
☐ Yes ☒ No
(If yes, cite the case name, docket number and the manner in which it is related on a separate sheet.)

Are there any related petitions currently pending below? ☐ Yes ☒ No
(If yes, cite the case name, tribunal and the manner in which it is related on a separate sheet.)

If an appealing party is a corporation an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable, please so indicate below. Alpha Metallurgical Resources is
Petitioner's parent company
☐ The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case? ☐ Yes ☒ No
If so, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.