

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**THE OFFICES OF THE INSURANCE COMMISSIONER OF WEST VIRGINIA
IN ITS OFFICIAL CAPACITY AS THE ADMINISTRATOR OF UNINSURED
EMPLOYER FUND,
Employer Below, Petitioner**

v.) No. 23-ICA-515 (JCN: 2023009920)

**TERRY HOWELL,
Claimant Below, Respondent**

and

**SOUTHEASTERN LAND, LLC,
Employer Below, Respondent**

**FILED
April 22, 2024**

ASHLEY N. DEEM, DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Offices of the Insurance Commissioner of West Virginia in its official capacity as the administrator of Uninsured Employer Fund (“OIC-UEF”) appeals the October 18, 2023, order of the Workers’ Compensation Board of Review (“Board”). Respondent Terry Howell filed a response.¹ OIC-UEF did not reply. The issue on appeal is whether the Board erred in reversing the claim administrator’s order, which rejected the claim for occupational hearing loss benefits.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2022). After considering the parties’ arguments, the record on appeal, and the applicable law, this Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the Board’s order is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Howell submitted an Employees’ and Physicians’ Report of Occupational Hearing Loss dated March 9, 2022. Mr. Howell reported that he had occupational hearing loss from working in a confined area while underground, walking along belts, and operating machinery in a confined space for 10-hour shifts, six days per week, for the last 40 years, and he last worked on August 2, 2020. The physician’s section was completed by B. Joseph Touma, M.D. Dr. Touma opined that Mr. Howell had bilateral sensorineural

¹ OIC-UEF is represented by James W. Heslep, Esq. Mr. Howell is represented by J. Robert Weaver, Esq. Southeastern Land, LLC did not appear.

hearing loss directly attributable to industrial noise exposure in the course of and resulting from his employment at Southeastern Land, LLC. Dr. Touma found that Mr. Howell had a 4.5% impairment due to work-related noise exposure.

Mr. Howell also submitted an Employee's Report of Occupational Injury and Proof of Employment dated June 29, 2022.² The date of injury was August 13, 2020, and the injury was described as "Exposure to rock dust and coal dust, while inspecting airways." This application for benefits identified Southeastern Land, LLC as the employer.

On October 27, 2022, the OIC-UEF issued an order rejecting Mr. Howell's application for benefits on the basis that Mr. Howell's date of last exposure was August 21, 2020, when he worked in Kentucky and his claim should, therefore, be filed in Kentucky.³ On November 28, 2022, the claim administrator issued an order rejecting the claim for the same reason. Mr. Howell protested both orders to the Board.

Mr. Howell was deposed on January 25, 2023, and February 7, 2023. In the January deposition, Mr. Howell testified that he started working for Southeastern Land, LLC in 2016. Mr. Howell stated that his employer had a major lay off in May 2020, and the mine he was working at in West Virginia stopped producing coal. Further, Mr. Howell testified that after the layoff there were only three employees, including himself, still working. Mr. Howell also testified that his last full shift with Southeastern Land, LLC was August 13, 2020, in West Virginia. Mr. Howell stated that he worked for C & B Construction, Co., in Kentucky, beginning on August 17, 2020, but he was laid off after one week and decided to retire.

In the February deposition, Mr. Howell testified that he worked ten-hour shifts, six days a week for Southeastern Land, LLC, in West Virginia, and that he was exposed to occupational noise during his entire shift. Mr. Howell stated that when he walked the belts, there would be a high-pitched noise from the splices hitting the rollers and that the motors are extremely loud when running. Mr. Howell further stated that he had to walk the belts every day, twice a day and after walking the belts, he would run the shuttle car which was extremely loud. Mr. Howell testified that he was exposed to noise from a continuous miner which has a scrubber, that sounds like a jet engine, that was in constant operation, and noise from rock and coal being busted up. Mr. Howell testified that after the layoff, but while still working for Southeastern Land, LLC, he continued to be exposed to noise from equipment such as the pinner, which was extremely loud; an enormous fan generating 400,000 cubic feet of air, which was deafening and ran constantly; and by operating equipment that needed to be moved out. Thus, Mr. Howell testified that he continued to be

² This application for benefits is not at issue in the instant appeal.

³ OIC-UEF did not raise this argument in its brief, thus it will not be addressed by this Court.

exposed to loud noises throughout his shift, even after May 2020 and until the last day he worked for Southeastern Land, LLC.

On October 18, 2023, the Board reversed the claim administrator's order rejecting the claim. The Board found that Mr. Howell established that he sustained hearing loss due to his occupational noise exposure. OIC-UEF now appeals the Board's order.

Our 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.

Duff v. Kanawha Cnty. Comm'n, 247 W. Va. 550, 555, 882 S.E.2d 916, 921 (Ct. App. 2022).

On appeal, OIC-UEF argues that Mr. Howell's date of last exposure is May 26, 2020, when the employer ceased active coal production. Although OIC-UEF admits that Mr. Howell credibly alleged hazardous noise exposure while working at the productive coal mine, the Board's finding that he continued to be exposed to hazardous noise after production at the mine ceased is not reliable. OIC-UEF further argues that because the employer was insured up to May 26, 2020, this claim should be charged to the employer and its insurer. We disagree.

Here, the Board determined that Mr. Howell's application for occupational hearing loss was timely because it was submitted within three years of August 13, 2020, his date of last exposure. The Board found that Mr. Howell established that he sustained hearing loss due to his occupational noise exposure at Southeastern Land, LLC, based on Dr. Touma's findings. The Board further found that Mr. Howell's testimony that he had continued to have noise exposure after May 26, 2020, is unrefuted and there is no evidence of record supporting OIC-UEF's position. Based on the determination that Mr. Howell's

date of last exposure was August 13, 2020, the Board found that OIC-UEF was chargeable rather than Southeastern Land, LLC, and its insurer.

Upon review, we find that the Board was not clearly wrong in finding that Mr. Howell established that he sustained hearing loss due to his occupational noise exposure at Southeastern Land, LLC, based on Dr. Touma's findings. We find no merit in OIC-UEF's argument that Mr. Howell was no longer being exposed to hazardous levels of noise after coal production ceased at Southeastern Land, LLC, on May 26, 2020, based on the evidence. Further, we find that the Board was not clearly wrong in determining that OIC-UEF failed to offer any evidence refuting Mr. Howell's testimony that he continued to be exposed to hazardous levels of noise until August 13, 2020, after Southeastern Land, LLC's insurance lapsed. Therefore, we find that the Board was not clearly wrong in finding that OIC-UEF was chargeable rather than Southeastern Land, LLC, and its insurer.

Accordingly, we affirm the Board's October 18, 2023, order.

Affirmed.

ISSUED: April 22, 2024

CONCURRED IN BY:

Judge Charles O. Lorensen
Judge Daniel W. Greear

Chief Judge Thomas E. Scarr, not participating