

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

21-0209

Argus Energy, LLC, Employer,

Petitioner,

v.

Clifford Marenko, Claimant,

Respondent.

JCN NO. 2018000604
BOR NO. 2053142
SUPREME COURT NO.

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BRIEF ON BEHALF OF PETITIONER
ARGUS ENERGY, LLC

Jordan Martin
WV Bar ID #12773
T. Jonathan Cook
WV Bar ID #9057
Cipriani & Werner, P.C.
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I. TABLE OF AUTHORITIES

W. Va. Code § 23-4-15(b) 3-8

Moran v. Rosciti Consti. Co., LLC
2018 W.Va. LEXIS 462, 2018 WL 2769077..... 6

W. Va. Code § 23-5-15 (b) 6

Pennington v. W. Va. Office of the Ins. Comm’r.
241 W. Va. 180, 820 S.E. 2d 626 (2018) 3,5,7-8

II. ASSIGNMENTS OF ERROR

1. The Board of Review clearly erred in affirming the OOH's June 25, 2018, decision as the decision is clearly wrong as a matter of law because the claimant did not file his application for OP benefits within the statute of limitations set forth under W. Va. Code § 23-4-15(b).
2. The Board of Review clearly erred in affirming the OOH's June 25, 2018, decision because the decision contradicts this Court's findings in Pennington v. W. Va. Office of the Ins. Comm'r., 241 W. Va. 180, 820 S.E. 2d 626 (2018).

III. STATEMENT OF THE CASE

The claimant signed an Employee's Report of Occupational Pneumoconiosis on September 6, 2016. Exhibit D. The application was also signed by his counsel on February 3, 2017. He advised he worked for the employer as a foreman and electrician from August 2010 until December 2013. The claimant advised he ceased work on December 31, 2013, because the coal mine shut down. The claimant advised his date of last exposure was December 31, 2013.

The Physician's Report of Occupational Pneumoconiosis was signed on January 31, 2017. The provider who completed the application did not diagnose impairment from OP. Under cover letter dated June 27, 2017, the four components which make up an application for OP benefits was mailed to the employer's workers' compensation carrier.¹ Exhibit D. The workers' compensation carrier received the properly completed application on July 3, 2017. The

¹ A properly completed application for OP benefits must be received before the potential OP claim will be considered by a workers' compensation carrier. 85 CSR 20-52.1. A properly completed application must include:

- 1) An Employee's Report of Occupational Pneumoconiosis;
- 2) A Physician's Report of Occupational Pneumoconiosis;
- 3) An ILO form properly completed by a certified "B" reader; and
- 4) A Listing of all alleged exposures to harmful dust, including type of dust, and extent and duration of exposure with each named employer.

Id.

properly completed application was filed over three years after the date of last exposure. The claimant did not introduce any evidence showing diagnosable impairment. In fact, the claimant testified he did not have impairment per the OP Board in a prior OP claim. Exhibit E.

By Order dated August 21, 2017, the Claim Administrator denied the claim on the basis the claimant failed to file his application within the applicable statute of limitations. Exhibit A.

On June 25, 2018, the Office of Judges issued a decision reversing the August 21, 2017, Order, and ordered the Claims Administrator accept the claim even though the same was not timely filed. Exhibit B.

Once the medical litigation concluded, the Board of Review entered an order on February 10, 2021, affirming the OOJ's June 25, 2018, decision. Exhibit C.

IV. SUMMARY OF ARGUMENT

West Virginia Code § 23-4-15(b) sets forth two time limitations for a claimant to file an application for occupational pneumoconiosis. In an OP claim which does not involve a death, the claimant must satisfy one of the following criteria:

- 1) The claimant must file the claim within three years from and after the last the last day of the last continuous period of 60 days or more during which the claimant was exposed to the hazards of OP; or
- 2) The claimant must file the claim within three years from and after a diagnosed impairment due to OP was made known to the claimant by a physician.

Id.

As discussed in more detail in the arguments set forth below, it is clear the claimant did not file his application for occupational pneumoconiosis benefits within three years of the date of last exposure. Additionally, with respect to the second time limitation, the claimant failed to provide documentation of diagnosed impairment from a physician. The Office of Judges agreed

the claimant “. . . has yet to be diagnosed with impairment from [OP].” The Office of Judges decision is in clear violation of this Court’s holding in Pennington v. W. Va. Office of the Ins. Comm’r., 241 W. Va. 180, 820 S.E. 2d 626 (2018), and the June 25, 2018, decision wrongly affirmed the Board of Review.

Accordingly, Argus Energy, LLC requests this Honorable Court REVERSE the decision of the Board of Review dated February 10, 2021, and find and conclude that this claim was barred by the statute of limitations set forth in West Virginia Code § 23-4-15(b) and REINSTATE the Claim Administrator August 21, 2017, Order denying the claim.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The facts and legal arguments are adequately presented by the employer’s brief and record before the Court. Therefore, the employer respectfully submits that oral argument is not needed for this appeal.

VI. ARGUMENT

A. STANDARD OF REVIEW

West Virginia Code § 23-5-15(b) provides in this Court’s review of a final Order by the Board of Review it shall consider the record before the Board of Review and give deference to the Board of Review’s findings, reasoning and conclusions, in accordance with the following:

(c) If the decision of the board represents an affirmation of a prior ruling by both the commission 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 re-weighing of the evidentiary record. If the court reverses or modifies a decision of the board pursuant to this subsection, it shall state with specificity the basis for the reversal or modification and the manner in which

the decision of the board clearly violated constitutional or statutory provisions, resulted from erroneous conclusions of law, or was based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record.

W. Va. Code § 23-5-15(c). Recently, this Court addressed its standard of review and held at Syllabus Point 1 of Moran v. Rosciti Constr. Co., LLC, 2018 W. Va. LEXIS 462, 2018 WL 2769077 as follows:

When reviewing a decision of the West Virginia Workers' Compensation Board of Review ("the Board"), this Court will give deference to the Board's findings of fact and will review de novo its legal conclusions. The decision of the Board may be reversed or modified only if it (1) is in clear violation of a constitutional or statutory provision; (2) is clearly the result of erroneous conclusions of law; or (3) is based upon material findings of fact that are clearly wrong.

Moran v. Rosciti Constr. Co., LLC, 2018 W. Va. LEXIS 462, *1, 2018 WL 2769077. With due consideration to this standard of review, this Court must reverse the Board of Review's Order as clearly incorrect and in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, and is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record.

1. The claimant did not file his application for OP benefits within the statute of limitations set forth under W. Va. Code § 23-4-15(b).

The statute of limitations for a claim for OP benefits states the following:

To entitle any employee to compensation for occupational pneumoconiosis under the provisions of this subsection, the application for compensation shall be made on the form or forms prescribed by the Insurance Commissioner, and filed with the Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, within three years from and after the last day of the last continuous period of sixty days or more during which the employee was exposed to the hazards of occupational pneumoconiosis or within three years from and after a diagnosed impairment due to occupational pneumoconiosis was made known to the employee by a physician and unless filed within the three-year period, the right to compensation under this chapter is forever barred, such time limitation being hereby declared to be a condition of the right and hence jurisdictional, or, in the case of death, the application shall be filed by the dependent of the employee

within two years from and after the employee's death, and such time limitation is a condition of the right and hence jurisdictional.

W. Va. Code § 23-4-15(b). Thus, in an OP claim that does not involve a death, the claimant must satisfy one of the following criteria:

- 1) The claimant must file the claim within three years from and after the last the last day of the last continuous period of 60 days or more during which the claimant was exposed to the hazards of OP; or
- 2) The claimant must file the claim within three years from and after a diagnosed impairment due to OP was made known to the claimant by a physician.

Neither of these criteria was met in this claim. As noted above, the claimant's date of last exposure was listed as December 31, 2013. The claimant, however, did not file his properly completed application for OP benefits with his employer's insurance carrier until July 3, 2017, over three years after his date of last exposure. Moreover, the claimant did not submit any evidence of diagnosed impairment being made known to him by a physician. Accordingly, pursuant to W. Va. Code § 23-4-15(b), the claim was not timely filed.

In the June 25, 2018, decision of Administrative Law Judge, the OoJ erroneously found the claimant was not barred from filing this claim even though the claimant clearly filed his application over three years from the date of last exposure and failed to introduce any evidence showing diagnosed impairment from a physician.

2. The Office of Judges decision and the Board of Review's Order directly contradict this Court's ruling in Pennington v. W. Va. Office of the Ins. Comm'r., 241 W. Va. 180, 820 S.E. 2d 626 (2018).

As discussed above, West Virginia Code § 23-4-15(b) sets forth two time limitations regarding the filing of an application for occupational pneumoconiosis. The first time limitation states that a claimant must file his application within three years of the date of last exposure. Clearly, the claimant did not file his application within three years of the date of last exposure. However, there is a second time limitation to consider, and this Court provided a detailed

discussion with respect to that second time limitation, which relates to when impairment due to occupational pneumoconiosis was made known to the claimant by a physician.

The Office of Judges June 25, 2018, decision and the Board of Review's February 10, 2021, Order are in direct contradiction to previous Board of Review rulings on this same issue regarding the statute of limitations. In Pennington v. W. Va. Office of the Ins. Comm'r., 241 W. Va. 180, 820 S.E. 2d 626 (2018), this Court adopted the Board of Review's interpretation of W. Va. Code § 23-4-15(b) in four claims consolidated for consideration by the Court. The Court held in Syllabus Point Two that:

Where a claim for occupational pneumoconiosis benefits has been denied, a new application may be filed, in cases not involving the death of a claimant, based on the same date of last exposure as the prior claim, if filed pursuant to the first time limitation and attendant requirements of W. Va. Code, 23-4-15(b) [2010]: within three years of the date of last exposure to occupational dust. If not filed within that time limitation, a new application may be filed pursuant to the second time limitation of W. Va Code, 23-4-15(b) [2010]: **within three years from and after a diagnosed impairment due to occupational pneumoconiosis was made known to the claimant by a physician.** Under the second time limitation, the new application, will not be referred to the Occupational Pneumoconiosis Board unless the Physician's Report filed with the claimant's new application sets forth a diagnosed impairment due to occupational pneumoconiosis.

Pennington, 241, W. Va. at 181-182. (Emphasis added).

In the instant claim, the claimant filed his application over three years from the date of last exposure and his application failed to demonstrate he suffered any impairment due to OP. Additionally, the claimant failed to introduce any evidence to the Office of Judges to show he suffered from impairment due to OP. Furthermore, the Office of Judges agreed the claimant "... has yet to be diagnosed with impairment from [OP]."

The claimant may still file a new application for occupational pneumoconiosis once he is diagnosed with impairment by a physician, as the Court further concluded in Pennington the

claimants would be “free to file a claim within three years of receiving a diagnosed impairment due to occupational pneumoconiosis.” *Id.* at 189.

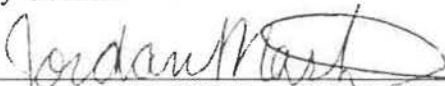
Pursuant to this Court’s holding in Pennington, the Board of Review’s February 10, 2021, Order must be reversed and the August 21, 2017, denial of the claim reinstated.

VII. CONCLUSION

Based on the facts of this claim, the evidence of record, and the law applicable thereto, Argus Energy, LLC requests this Court REVERSE the decision of the Board of Review and find and conclude this claim was barred by the statute of limitations and REINSTATE the August 21, 2017, Order which denied the claim.

Respectfully submitted,

Argus Energy, LLC
By Counsel

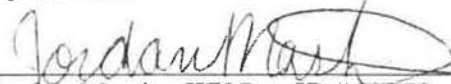

Jordan Martin, *WV Bar ID #12773*
T. Jonathan Cook, *WV Bar ID # 9057*

CERTIFICATE OF SERVICE

I, T. Jonathan Cook, attorney for the Appellant, Argus Energy, LLC, hereby certify that a true and exact copy of the foregoing "Brief on Behalf of Appellant, Argus Energy, LLC" was served upon the Appellee by forwarding a true and exact copy thereof in the United States mail, postage prepaid, this 12th day of March, 2021, addressed as follows:

Donald Wandling, Esquire
Avis, Witten & Wandling, LC
229 Stranton Street
P.O. Box 417
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Argus Energy, LLC
By Counsel



Jordan Martin, *WV Bar ID #12773*
T. Jonathan Cook, *WV Bar ID # 9057*

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APPENDIX B – REVISED RULES OF APPELLATE PROCEDURE

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WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT

Complete Case Title: Clifford Marenko v. Argus Energy LLC
 Petitioner: Argus Energy LLC Respondent: Clifford Marenko
 Counsel: Jordan E. Martin Counsel: Donald C. Wandling
 Claim No.: 555-242010 Board of Review No.: 2053142
 Date of Injury/Last Exposure: 12/31/2013 Date Claim Filed: 6/17/2017
 Date and Ruling of the Office of Judges: 6/25/2018
 Date and Ruling of the Board of Review: 2/10/2021
 Issue and Relief requested on Appeal: Reinstatement of Denial of Claim



CLAIMANT INFORMATION

Claimant's Name: Clifford Marenko
 Nature of Injury: Occupational Pneumoconiosis
 Age: 76 Is the Claimant still working? Yes No. If yes, where: _____
 Occupation: Coal Miner No. of Years: _____
 Was the claim found to be compensable? Yes No If yes, order date: OOJ Decision

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.

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.