

In the
SUPREME COURT OF APPEALS OF WEST VIRGINIA
Charleston, West Virginia



SCOTTISH RITE BODIES OF CHARLESTON,

Petitioner,

vs.

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Appeal No. 2057460
SC No.: 22-0427
Claim No. 2020023177
Order Date: 04/27/2022

THOMAS W. WEESE

Respondent/Appellee.

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BRIEF ON BEHALF OF RESPONDENT/APPELLEE
THOMAS W. WEESE

Patrick K. Maroney, Esquire
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Counsel for Respondent/Appellee

June 24, 2022

TYPE OF APPEAL

This claim comes upon the employer's appeal to the April 27, 2022, decision of the Workers' Compensation Board of Review which found the claimant was exposed to wet, damp working conditions and developed Legionella pneumonia, while working for the employer. The Board of Review was correct in its findings and did not commit an error of law or fact for the reason stated below.

STATEMENT OF THE CASE

The April 13, 2020, Employees' and Physicians' Report of Occupational Disease was completed alleging the claimant was exposed to Legionella pneumonia. The claimant described the injury occurred when he was helping to install a boiler, cleaning standing water on numerous occasions as a janitor for the employer. The physician's section of the form was completed by Dr. Takubo who indicated that the claimant had restricted airway from inhalation of cleaning supplies. Dr. Takubo, at this time, believed his condition was a result of a non-occupational condition. After further testing and information, Dr. Takubo amended the physicians form. (Claimant's submission 11/04/2020).

Both parties submitted the March 7, 2020, through March 19, 2020, medical records from Charleston Area Medical Center (hereinafter CAMC). The claimant presented on March 7, 2020, with general weakness, nausea, vomiting and diarrhea. He had a fever upon arrival and an x-ray of the chest revealed new right upper lobe infiltrate suggesting pneumonia. Assessment was pneumonia, nausea, vomiting, diarrhea, and generalized weakness. The March 9, 2020, records revealed the claimant's symptoms had progressed and his shortness of breath had worsened, he had dyspnea with severe weakness. He had progressed to respiratory failure requiring intubation and vent support. He was admitted to ICU and it was later determined he had a positive PCR procedure/test which was positive for Legionella. He noted that the claimant did some part-time janitorial work at a local Mason Lodge.

On March 9, 2020, Dr. Takubo's addendum found that it is "unclear as to the etiology of his legionella pneumonia."

Dr. Akbar, on March 17, 2020, notes that on March 15, 2020, the claimant was deescalated from the ICU to floor care. The claimant's respiratory status had improved. The claimant's severe sepsis was secondary to pneumonia as well as the UTI. The sepsis was reported as improved. The assessment of community acquired pneumonia was secondary to Legionella.

On March 19, 2020, the claimant reported that he felt better and denied chest pain, difficulty breathing, nausea, and vomiting. It was reported that the severe sepsis had resolved and that the antibiotic therapy was completed regarding the community acquired pneumonia.

The employer submitted the chest x-ray report dated April 16, 2020. This revealed a right-sided infiltrate previously demonstrated and no acute pulmonary disease process. The indication for the study was Legionnaire's disease, abnormal imaging.

On November 4, 2020, the claimant submitted the amended Employees' and Physicians' Report of Occupational Injury, or disease dated April 13, 2020. Dr. Takubo added that the claimant's condition was a direct result of his exposure to a damp basement due to leaking.

The claimant submitted numerous photos of the damp wet basement and rooms that he worked in for his employer. The photos show water damage and the areas the claimant cleaned up and was exposed to moldy water.

The claimant submitted his deposition transcript that was taken on January 13, 2021, regarding this injury and his work environment. The claimant worked for the Scottish Rights for twelve years as a janitor and whatever broke down, he tried to fix it. He worked in the basement and on the second and third floor. There was standing or stagnant water in the bottom basement and front basement. He would have to go to the basement a couple times a week to clean water out of the basement. He described the basement as having a musty smell, like dirty water...and it

was wet water or wet waste. He testified he did provide pictures of the basement and work-place. (Tr. pgs. 1-5)

In the first picture there is a blue motor that would run the boiler, and there is a hot water tank in the corner. He described that under the I-beam it was full of water at one time. He would pump it over into the sewer part because it would fill up almost to the boiler and up to the I-beam. (Tr. pgs. 6,7) The water would splash on him occasionally. He described an incident when the hot water heater busted and put water everywhere. (Tr. pgs. 8) When asked if there was water in the basement in February or January 2020 the claimant stated "yes" and explained that he would have been down there to clean it up, sweep it and sometimes hook a water hose up and wash the old stuff out of there. The white pipeline broke and filled that thing about full. (Tr. pgs. 9-11).

In the storage room and he would have to get the water out and then wash it out into the basement area. He would squeegee the water and it would go down in the sewer line. He stated it would splash up because the room is not real smooth. He was down there about every day in January or February 2020 to check for stuff because he knew it was bad about water coming in there. (Tr. pgs. 12, 13)

The claimant described there was water on the steps and on the floor under the steps. (Tr. pgs. 15) He would have to clean the water up and go down there once a week to open a valve on the bottom of the boiler to flush the boiler out. (Tr. pgs. 16, 17)

Upstairs in the dining room there were two bad leaks and they set a 55 gallon drum on the floor to catch the water. The claimant would not let the barrels get too full because then they got too heavy to pull and empty. (Tr. pgs. 19-21) The claimant stated that it had been a wet building for a while. You could see the water running down inside the ceiling. (Tr. pgs. 22)

Stagnant water in the boiler room that had to be cleaned up prior to the placement of the new boiler. In the auditorium there were leaks where the paint was coming off the ceiling. It would get on the carpet, floor, and the seats.

On October 1, 2021, the Administrative Law Judge affirmed the Claim Administrator decision.

The claimant appealed this decision and the Board of Review properly reversed this decision by order dated April 27, 2022.

ISSUE

Did the Workers' Compensation Board of Review commit any clear legal or factual erroneous errors in reversing the Administrative Law Judge?

POINTS OF AUTHORITY

W. Va. Code §23-4-1g provides that, for all awards made on and after July 1, 2003, the resolution of any issue 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. No issue may 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. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence may not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

An employee who receives an injury in the course of and resulting from his or her covered employment receives benefits. W. Va. Code § 23-4-1. An employee who is injured gradually by reason of duties of employment and eventually becomes disabled is, under workers' compensation law, no less the recipient of a personal injury than one who suffered a single disabling trauma. Lilly v. State Workmen's Compensation Commissioner, 159 W.Va. 613, 225 S.E.2d 214 (1976), Syl. pt. 3.; Sansom v. Workers' Compensation Commissioner, 176 W.Va. 545, 346 S. E.2d 63 (1986).

W.Va. Code §23-4-1(f) provides that diseases may be incurred in the course of or have resulted from employment. No ordinary disease of life to which the general public is exposed outside of employment is compensable unless it is apparent "(1) that there is a direct causal connection between the conditions under which work is performed and the occupation disease, (2) that it can be seen to have followed as 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 an employer and employee, and (6) that it must appear to have had its origin in the 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 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. Powell v. State Workmen's Compensation Commissioner, 166 W.Va. 327, 273 S.E. 2d 832 (1980).

In Casdorph v. West Virginia Office of the Insurance Commission, 225 W.Va. 94, 690 S.E.2d 102, the claimant filed a claim due to gasoline exposure which developed into the disease chronic myelogenous leukemia (hereinafter CML) as not compensable as an occupational disease. Specifically, the denial found that this was an ordinary disease of life and that he had been aware of his condition more than three years prior to his filing. The claimant appealed the decision and the Court found that the claimant's CML resulted from his occupation, therefore, was compensable. Again, the Court found that the claimant was not required to prove that the conditions of his employment whether exclusive or sole cause of the disease, nor does it require the claimant to show that the disease is particular to one industry, work environment or occupation. Syl. pt.3 of Powell v. SWCC.

DISCUSSION

The Board of Review correctly reviewed the facts and law in holding the claim compensable for Legionella disease. The Board of Review found that the claimant's testimony and photographs of his work-place showed that he worked in an area that was damp and contained water. The medical evidence clearly shows that the claimant was diagnosed with Legionella and it was the result of his damp and severely wet work environment. The CAMC records made a positive diagnosis of Legionella during his stay on March 7, 2020. The evidence

shows that he was exposed to water at his work-place numerous times and developed Legionella. That evidence was not rebutted.

The Administrative Law Judge quoted the Mayo Clinic website “Legionnaires' disease, is a severe form of pneumonia usually caused by infection. It's caused by a bacterium known as Legionella. Most people catch Legionnaires' disease by inhaling the bacteria from water or soil.” Even with that statement the Administrative Law Judge created more of a burden on the claimant than required by the statute. The Administrative Law Judge subjectively found Dr. Takubo was aware of the claimant's exposure to the large amounts of stale water at work and the water contained Legionella bacteria. The Administrative Law Judge failed to consider Dr. Akbar record, the totality of the CAMC records and the lab results that the claimant developed and was diagnosed with Legionella's bacteria. Dr, Takubo stated earlier that the cause of Legionella was not clear and then later amended his physician section of the workers compensation application.

This amended report is after Dr. Takubo considered the claimant's work environment and he developed Legionella. The Board of Review based upon the complete facts and law found the claimant's legionella occurred from inhaling the bacteria at the claimant's work site clearly meets the factors of an occupational disease. There is a direct connection to his work environment that legionella was a natural incident of the stagnant, moldy water the claimant had to work around and clean up; it is fairly easy to trace the legionella to his employment and no environment outside his workplace has been shown to cause his legionella; as a janitor it is the nature of this employee/employer relationship to clean, and the exposure/risk is directly connected to his employment.

The Board correctly weighed the evidence. It is clear that Dr. Short did not have a chance to review the claimant's deposition nor the photographs of the water exposure the claimant had to work in and around. Dr. Short failed to consider that the claimant's exposure could be different than a co-worker, exposure in finding that the claimant could not have contacted the Legionella disease because the co-worker did not. Just as two coal miners working beside each other, one may have no impairment after the same length and environmental exposures to coal dust than another.

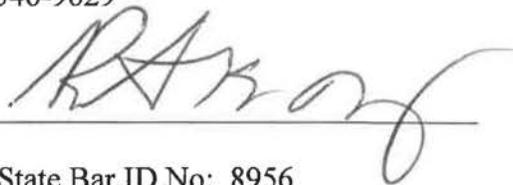
CONCLUSION

Wherefore, the claimant/appellee, Thomas W. Weese, respectfully requests that this Court affirm the decision of the Board of Review dated April 27, 2022.

Respectfully yours,

Maroney, Williams, Weaver, & Pancake, PLLC
Post Office Box 3709
Charleston, WV 25337
304/346-9629

By



WV State Bar ID No: 8956

June 24, 2022

CERTIFICATE OF SERVICE

I, Patrick K. Maroney, counsel for Respondent/Appellee herein, do hereby certify that I served the foregoing Response to Petition upon the following by hand delivery and/or by mailing a true and accurate copy of the same via the United States Mail, postage prepaid, on this the 24th day of June, 2022.

HAND DELIVERY:

Edythe Nash Gaiser, Clerk
State of West Virginia
Supreme Court of Appeals
State Capitol Building
Charleston, WV 25305

VIA UNITED STATES' POSTAL SERVICE:

Charity K. Lawrence, Esquire
Spilman Thomas & Battle
PO Box 273
Charleston, WV 25321

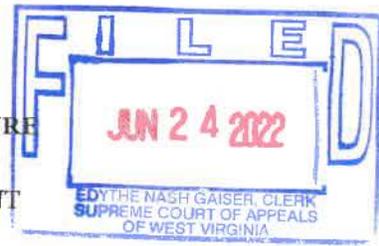
Encova Mutual Insurance
PO Box 3151
Charleston, WV 25333


PATRICK K. MARONEY

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**APPENDIX B – REVISED RULES OF APPELLATE PROCEDURE
WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT**



Complete Case Title: Scottish Rite Bodies of Charleston v. Thomas Wayne Weese

Petitioner: Scottish Rite Bodies of Charleston Respondent: Thomas W. Weese

Counsel: H. Dill Battle Counsel: Patrick K. Maroney

Claim No.: 2020023177 Board of Review No.: 2057460

Date of Injury/Last Exposure: 03/04/2020 Date Claim Filed: 04/13/2020

Date and Ruling of the Office of Judges: 10/01/2021

Date and Ruling of the Board of Review: 04/27/2022

Issue and Relief requested on Appeal: Affirmation of Board of Review Order

CLAIMANT INFORMATION	
Claimant's Name:	<u>Thomas W. Weese</u>
Nature of Injury:	<u>Legionnaires' Disease</u>
Age: <u>76</u>	Is the Claimant still working? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No. If yes, where: _____
Occupation: <u>Janitor</u>	No. of Years: _____
Was the claim found to be compensable? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If yes, order date: <u>04/27/2022</u>	

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: _____
(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.