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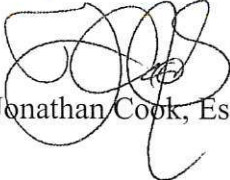
The Honorable Daniel Greear, Chief Judge
West Virginia Intermediate Court of Appeals
WV Judicial Tower
4700 MacCorkle Ave, SE
Charleston, WV 24304

RE: Joseph Dorsey v. Blackhawk Mining, LLC. (OP)
Appeal No.: No. 24-ICA-254
Claim No.: 2078516
JCN No.: 2023006378

Dear Judge Greear:

Enclosed please find the original of the "Brief on Behalf of Blackhawk Mining LLC" in the above claim. Thank you for your consideration of this matter.

Very truly yours,


T. Jonathan Cook, Esquire

TJC/mm

Enclosure

CC: Blackhawk Mining LLC (via e-mail)
Sam B. Petsonk, Esquire
Rockwood Casualty Insurance Company, Karen Cates (via e-mail)
Sean Harter, Esquire

**BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS
CHARLESTON, WEST VIRGINIA**

JOSEPH CRAIG DORSEY,

Appellant,

v.

Intermediate Court No. 24-ICA-254

BLACKHAWK MINING, LLC,

Appellee.

BRIEF ON BEHALF OF APPELLEE

**T. Jonathan Cook, Esq.
WV Bar ID #9057
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I. TABLE OF AUTHORITIES

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II. ASSIGNMENT OF ERROR

Given the insufficiency of the claimant's evidence and argument in proving the presence he should be paid benefits from a date of disability in September 2022, the BOR did not err in finding the claimant was not entitled to the backpay award asserted he asserted.

III. STATEMENT OF THE CASE

The claim administrator's order dated October 3, 2023, states the 65% permanent partial disability award amounts to $65\% \times 4$ (weeks for each percentile) = 260 weeks \times \$670.18 = \$174,246.80. **EX 1.** Further, the order states that the award will be paid out bi-weekly (every 2 weeks) and will continue until the 260 weeks have been paid or changed by order. **Id.**

The claimant submitted a copy of a check dated October 18, 2023, in the amount of \$1,340.36, which is payable to the claimant. An attached explanation indicates that this payment is for the time period of October 3, 2023, to October 16, 2023. **EX 2.**

The Workers' Compensation Board of Review (BOR) issued a final order dated June 12, 2024, regarding the claimant's protest to the onset date of disability. **EX 3.** On page 2 of the order, the BOR noted the claimant's argument in support of his position:

The claimant submitted a closing argument dated April 5, 2024. Counsel asserted that pursuant to W. Va. § Code 23-4-18, the claimant is entitled to backpay from the date of disability in September of 2022 through the date the employer commenced making monthly payments in October of 2023. The claimant requested that the employer be ordered to make 234 payments of \$670.18 (total of \$156,822.12) and one back-payment of \$17,424.68, which equals the same total award as originally computed (\$174,246.80).

The BOR affirmed the onset date in the order explaining:

W. Va. Code § 23-4-18 provides in part as follows: "In all cases where compensation is awarded or increased, the amount of compensation shall be calculated and paid from the date of disability." The claimant asserts that the date of disability fell within the month of September 2022 and that he is entitled to backpay beginning in September of 2022. The claimant did not cite any case law to support his position.

The West Virginia Supreme Court addressed W. Va. Code § 23-4-18 in Burgess v. State Compensation Commissioner, 121 W. Va. 571, 5 S.E.2d 804 (1939); Dunlap v. State Compensation Director, 149 W. Va. 266, 140 S.E.2d 448 (1965); and Carter v. Spieler, 183 W. Va. 126, 394 S.E.2d 528 (1990). These cases involve the date of disability for permanent total disability benefits.

W. Va. Code § 23-4-6a provides in part as follows: "If an employee is found to be permanently disabled due to occupational pneumoconiosis, as defined in section one of this article, the percentage of permanent disability is determined by the degree of medical impairment that is found by the Occupational Pneumoconiosis Board. The Commission, successor to the Commission, other private carrier or self-insured employer, whichever is applicable, shall enter an order setting forth the findings of the Occupational Pneumoconiosis Board with regard to whether the claimant has occupational pneumoconiosis and the degree of medical impairment, if any, resulting therefrom." The claim administrator complied with this Code section. The claimant has not established that he is entitled to the relief he seeks. The claim administrator's order will be

affirmed regarding the issue of payment in accordance with W. Va. Code § 23-4-18.

Id.

IV. 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 oral argument is not needed for this appeal.

V. ARGUMENT

A. *Standard of Review*

West Virginia Code § 23-5-12a states this Court's shall reverse, vacate, or modify the order or decision of the BOR if the substantial rights of the petitioner or petitioners have been prejudiced because the BOR'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.

With due consideration to this standard of review, the BOR did not err in concluding the claimant did not prove he met the requisite impairment needed for further PTD consideration.

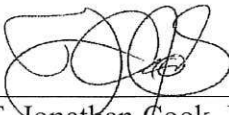
B. The BOR correctly found the claimant did not have a legal basis to support his onset date argument..

The claimant asserts entitlement to backpay from September 2022 based on W. Va. Code § 23-4-18, which mandates that compensation be calculated and paid from the date of disability. However, this assertion lacks supporting case law and overlooks the precedents set by the West Virginia Supreme Court of Appeals in Burgess v. State Compensation Commissioner, 121 W. Va. 571, 5 S.E.2d 804 (1939), Dunlap v. State Compensation Director, 149 W. Va. 266, 140 S.E.2d 448 (1965), and Carter v. Spieler, 183 W. Va. 126, 394 S.E.2d 528 (1990). These cases emphasize the necessity of determining the date of disability in the context of **permanent total disability** benefits, which must be established through proper legal and medical evaluation, not **permanent partial disability**.

Additionally, W. Va. Code § 23-4-6a requires the percentage of permanent disability due to occupational pneumoconiosis be determined by the Occupational Pneumoconiosis Board. The claim administrator adhered to this requirement meaning the onset of disability could not possibly be prior to the date of the evaluation performed by the Occupational Pneumoconiosis Board. Without the claimant establishing a clear legal basis for his position, the claimant is not entitled to the relief he seeks under the applicable legal framework. Accordingly, the BOR did not err either legally or factually in affirming the claims administrator's order.

VI. CONCLUSION

The employer moves this Court to affirm the BOR's final order dated June 12, 2024.

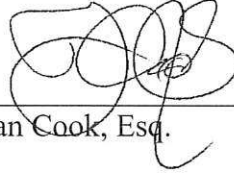


T. Jonathan Cook, Esq.
WV Bar ID #9057

CERTIFICATE OF SERVICE

I certify a true and correct copy of the foregoing brief was served as follows this 21st day
of August 2024:

Mr. Sam B. Petsonk
417 East Main Street
Oak Hill, WV 25901
sam@petsonk.com

A handwritten signature in black ink, appearing to be 'T. Jonathan Cook', written over a horizontal line.

T. Jonathan Cook, Esq.