

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

JEFFREY W. HUNDLEY
Claimant Below, Petitioner

v.) No. 24-ICA-273 (JCN: 2023006127)

AUSTIN POWDER COMPANY,
Employer Below, Respondent

FILED
February 28, 2025

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

MEMORANDUM DECISION

Petitioner Jeffrey W. Hundley appeals the June 10, 2024, order of the Workers' Compensation Board of Review ("Board"). Respondent Austin Powder Company ("Austin") timely filed a response.¹ Mr. Hundley did not file a reply. The issue on appeal is whether the Board erred in affirming the claim administrator's order, which rejected Mr. Hundley's occupational pneumoconiosis ("OP") claim.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2024). After considering the parties' arguments, the record on appeal, and the applicable law, this Court finds that there is error in the lower tribunal's decision but no substantial question of law. This case satisfies the "limited circumstances" requirement of Rule 21(d) of the Rules of Appellate Procedure for reversal in a memorandum decision. For the reasons set forth below, the Board's decision is reversed, and this case is remanded for further proceedings consistent with this decision.

Mr. Hundley submitted an Employees' Report of Occupational Pneumoconiosis dated April 27, 2022. Mr. Hundley stated that he was exposed to the hazards of OP in West Virginia for 31 years, between 1989 and March 20, 2020. Mr. Hundley indicated that he was last exposed to minute dust particles on March 20, 2020.

On April 27, 2022, Mr. Hundley underwent a pulmonary function test at Rainelle Medical Center. The interpretation was simple pneumoconiosis and moderate obstructive lung disease. On May 4, 2022, medical personnel at the Black Lung Clinic of Rainelle Medical Center completed a Physician's Report of Occupational Pneumoconiosis, which indicated that Mr. Hundley was diagnosed with simple pneumoconiosis. The report

¹ Mr. Hundley is represented by Patrick K. Maroney, Esq. Austin is represented by T. Jonathan Cook, Esq.

indicated that Mr. Hundley had contracted OP and that his capacity for work was moderately impaired.

On January 26, 2023, the claim administrator issued an order denying Mr. Hundley's OP claim on the basis that he was not exposed to the hazards of OP in the course and scope of his employment with Austin, and that he was not exposed to the hazards of OP pursuant to West Virginia Code § 23-4-1 (2021) and § 23-4-15(b) (2010).

On October 11, 2023, Mr. Hundley gave a deposition and testified that he started working for Austin on January 31, 2020. Mr. Hundley further testified that his employment with Austin ended before the last day of March of 2020, and that he was laid off due to COVID-19. Mr. Hundley indicated that his job duties included drilling sandstone rock and coal, and that he was exposed to dust for approximately eight to nine hours per day. Mr. Hundley stated that he was exposed to rock dust, coal dust, quartz, limestone, and sandstone while at work. Mr. Hundley indicated that 80-90% of the time another employee was drilling nearby, and he would be exposed to additional dust. Further, Mr. Hundley stated that he worked for Virginia Drilling in the same position for eleven to twelve years before working for Austin. He indicated that Austin underbid Virginia Drilling, and that he started working for Austin on the same site without missing a day of work.

Rachel Ittel, a coworker of Mr. Hundley, completed a signed affidavit on March 19, 2024. Ms. Ittel indicated that Mr. Hundley was hired by Austin on January 31, 2020, that he was on seasonal layoff as of March 30, 2020, and that he worked less than sixty shifts for Austin during his brief employment with the company.

On June 10, 2024, the Board issued an order affirming the claim administrator's January 26, 2023, order, which rejected Mr. Hundley's claim. The Board concluded that Mr. Hundley did not establish that he was exposed to the hazards of OP for sixty days while working for Austin pursuant to West Virginia Code § 23-4-1(b). It is from this order that Mr. Hundley now appeals.

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.

Syl. Pt. 2, *Duff v. Kanawha Cnty. Comm'n*, 250 W. Va. 510, 905 S.E.2d 528 (2024).

On appeal, Mr. Hundley argues that the Board failed to consider his employment and dust exposure history in denying his OP claim. Mr. Hundley also asserts that the claim administrator failed to timely respond to the claim and exceeded the statutory deadline of ninety days in which a carrier is required to respond to an application.² With respect to Mr. Hundley's argument that the claim administrator failed to timely respond to his claim, this issue was not addressed in the Board's order, and it does not appear that Mr. Hundley filed a "Failure to Timely Act" claim pursuant to West Virginia Code § 23-4-1c(a)(3) (2009).³ Thus, we will not consider this argument on appeal, as it is not properly before this Court. Next, Mr. Hundley contends that the claim administrator for Austin failed to follow West Virginia Code §§ 23-5-1(a) and 23-5-1(b)(2)(A) which require the company to notify the

² Although Mr. Hundley states that the ninety-day period is statutory, it is found in West Virginia Code of State Rules § 85-1-10.2 (2009), which provides in part: "The responsible party shall enter non-medical decisions in occupational pneumoconiosis claims within ninety (90) days from the date the responsible party receives properly executed, prescribed forms." However, Mr. Hundley correctly states that the claim administrator is generally required to enter a non-medical decision within ninety days from the date an application is received.

³ West Virginia Code § 23-4-1c(a)(3) provides:

Any party may object to the order of the Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, and obtain an evidentiary hearing as provided in section one, article five of this chapter: Provided, That if the successor to the commissioner, other private carrier or self-insured, whichever is applicable, fails to timely issue a ruling upon any application or motion as provided by law, or if the claimant files a timely protest to the ruling of a self-insured employer, private carrier or other issuing entity, denying the compensability of the claim, denying temporary total disability benefits or denying medical authorization, the Office of Judges shall provide a hearing on the protest on an expedited basis as determined by rule of the Office of Judges.

Board that another employer should be added as a potentially chargeable employer. A determination of the appropriate chargeable employer is properly before this Court.

Pursuant to West Virginia Code § 23-4-15b (2009)⁴:

If a claim for occupational pneumoconiosis benefits is filed by an employee within three years from and after the last day of the last continuous period of sixty days' exposure to the hazards of occupational pneumoconiosis, the Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, shall determine whether the claimant was exposed to the hazards of occupational pneumoconiosis for a continuous period of not less than sixty days while in the employ of the employer within three years prior to the filing of his or her claim. . . .

Here, the record establishes that Mr. Hundley was employed by Austin from January 31, 2020, to March 27, 2020. However, he previously worked for Virginia Drilling on the same site for eleven to twelve years directly prior to his employment with Austin. The Board's order lists the date of last exposure as March 20, 2020. Pursuant to West Virginia Code of State Rules § 102-1-14 (2022), the Board shall notify the potentially chargeable employer and its carrier when it "appears that another employer may have liability in the claim." The Board's order references Mr. Hundley's testimony regarding his employment with Virginia Drilling, but it appears that the Board did not consider whether Virginia Drilling is a chargeable employer in this claim. Accordingly, we reverse and remand this case to the Board for it to accept additional evidence regarding which employer should be charged for this claim.

Reversed and Remanded.

ISSUED: February 28, 2025

CONCURRED IN BY:

Chief Judge Charles O. Lorensen
Judge Daniel W. Greear
Judge S. Ryan White

⁴ We note that although the Board and Mr. Hundley cited to West Virginia Code § 23-4-1(b), West Virginia Code § 23-4-15b is the applicable statute here.