

STATE OF WEST VIRGINIA
INTERMEDIATE COURT OF APPEALS

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UNION CARBIDE CORPORATION,
a subsidiary of THE DOW CHEMICAL COMPANY,

Petitioner,

v.

CHRISTINA DEARIEN (Decedent),
THOMAS DEARIEN (Dependent),

Respondent.

ICA No:
JCN: 2022005028
DOD: 06/02/2021
DOF: 09/13/2021
BOR Order: May 30, 2024

**BRIEF IN SUPPORT OF THE PETITION FOR REVIEW ON BEHALF OF THE
PETITIONER, UNION CARBIDE CORPORATION a subsidiary of
THE DOW CHEMICAL COMPANY**

Timothy E. Huffman
JACKSON KELLY PLLC
Post Office Box 553
Charleston, WV 25322
tehuffman@jacksonkelly.com
Direct Dial: 304-340-1301
Fax: (304) 340-1044
Bar # 1814

Counsel for the Petitioner,
UNION CARBIDE CORPORATION,
a subsidiary of THE DOW CHEMICAL COMPANY

June 28, 2024

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I. STATEMENT OF THE ISSUES

- A. WHETHER THE CLAIM FOR DEPENDENT BENEFITS WAS BARRED BY THE FINAL ORDER AFFIRMING THE REJECTION OF THE DECEDENT'S LIVING CLAIM FOR OCCUPATIONAL DISEASE BENEFITS?**
- B. WHETHER THE MAY 30, 2024 FINAL ORDER ENTERED BY THE BOARD OF REVIEW WAS CLEARLY WRONG IN VIEW OF THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD?**

II. STATEMENT OF THE CASE

On March 11, 2019, the Decedent, Christina Dearien, filed an application for benefits claiming that she had contracted colon cancer as an occupational disease while employed by the Petitioner. A medical review was conducted by Dr. Mohammed Ranavaya and a report was prepared on March 16, 2020 (Appendix 4). Dr. Ranavaya concluded that he found no credible or reliable evidence to establish that the Decedent's colon cancer was causally related to her employment.

By Order entered on June 5, 2020, the Decedent's living claim for benefits in Claim Number 2019020262-OD was denied, with a finding that the evidence failed to establish a direct causal connection between the Decedent's employment and the disease for which the claim was filed. That Order was based upon the opinion of Dr. Ranavaya as expressed in his March 16, 2020 report. The Decedent filed a protest to the June 5, 2020 ruling in Claim Number 2019020262-OD.

By correspondence dated August 24, 2021, counsel for the Decedent, advised of the Decedent's death which occurred on June 2, 2021 and consequently withdrew the Decedent's protest to the June 5, 2020 ruling in Claim Number 2019020262-OD.

By Order dated August 27, 2021, the Decedent's protest was noted to be withdrawn and the protest to the Claims Administrator's Order of June 5, 2020 which rejected the claim as an occupational disease, was dismissed

Thereafter, on September 10, 2021, an application for fatal dependent's benefits was filed by Thomas Dearien, the Decedent's surviving spouse. In response to that application for dependent's benefits, an Order was entered by the Claims Administrator on September 24, 2021 in Claim Number 2022005028 OD Fatal (Appendix 2), ruling that the application for fatal

dependent's benefits, was rejected on the basis of Dr. Ranavaya's March 16, 2020 report which found no direct causal connection between the Decedent's employment and the disease which resulted in her death. Additionally, the September 24, 2021 Order held that by the withdrawal of the Decedent's protest in the living claim, the June 5, 2020 ruling became a final order and the rejection order of June 20, 2020 constituted the final resolution of the issue of a casual connection between the Decedent's diagnosis of colon cancer and her employment. Thereafter, the Dependent filed a protest to the September 24, 2021 Order in Claim Number 2022005028-OD Fatal.

In support of his protest, the Dependent offered into evidence a number of exhibits as were noted in the record considered and attached to the Board of Review's final Order of March 30, 2024 (Appendix 19). The Employer responded with the evidence submitted to the Board of Review as also noted in the Board of Review's final order of March 30, 2024 (Appendix 19).

At the conclusion of litigation, the claim was submitted for a decision and a final order was entered by the Board of Review on May 30, 2024. That ruling contains a detailed discussion of the evidence which was submitted by both parties. Based upon the Board's review of that evidence, the Board concluded that the evidence regarding a causal link between the chemicals the Decedent claimed exposure to while working for the Petitioner and her development of colorectal cancer was "mixed." The Board of Review resolved the question of which evidence was more credible, by concluding that all of the evidence was found to be of equal evidentiary weight and therefore pursuant to *West Virginia Code* § 23-4-1(g), the resolution most consistent with the Claimant's position was adopted. The Board then concluded that the Decedent's colorectal cancer was more likely than not, causally related to her occupational exposures with

the Petitioner. On that basis, the Board determined that the Dependent is entitled to an award of dependent's benefits.

Regarding the issue of whether the claim for dependent's benefits is barred by the doctrine of collateral estoppel, based upon the Supreme Court's ruling in *Staubs v. State Workers' Compensation Commissioner*, 153 WV 337, 168 SE2d 730 (1969), the Board held that the Dependent's claim was not barred as it was a separate and distinct claim from the Claimant's living claim for occupational disease benefits.

On the basis of those findings, the Board of Review reversed the Claims Administrator's September 24, 2021 ruling and ordered that the Claimant's application for fatal dependent's benefits be granted. This proceeding is a petition for review from the final order of the Board of Review dated March 30, 2024.

III. SUMMARY OF ARGUMENT

- A. THE CLAIM FOR DEPENDENT BENEFITS WAS BARRED BY THE FINAL ORDER AFFIRMING THE REJECTION OF THE DECEDENT'S LIVING CLAIM FOR OCCUPATIONAL DISEASE BENEFITS.**
- B. THE MAY 30, 2024 FINAL ORDER OF THE BOARD OF REVIEW, WAS CLEARLY WRONG IN VIEW OF THE RELIABLE PROBATIVE AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD.**

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The respondent does not require or request to present oral argument regarding this issue.

V. ARGUMENT

A. THE CLAIM FOR DEPENDENT'S BENEFITS WAS BARRED BY THE FINAL ORDER AFFIRMING THE REJECTION OF THE DECEDENT'S LIVING CLAIM FOR OCCUPATIONAL DISEASE BENEFITS.

With regard to the question of collateral estoppel, in *State of West Virginia v. Susan Miller*, 194 W.Va. 3 459 S.E.2nd 114 (1995), the West Virginia Supreme Court Appeals established clear parameters regarding the doctrine of collateral estoppel and the applicability of that doctrine to the decisions of administrative agencies. More recently, the Court again addressed the doctrine of collateral estoppel in a decision rendered in the case of *Ruble v Rust-Oleum Corporation, et al*, Slip Op. No. 22-0329, January 2024 Term (Filed June 12, 2024).

The Defendant in *State v. Miller* was convicted of the criminal offense of battery after she was terminated as a nurse at a state operated facility. After her termination, Ms. Miller filed a grievance and was subsequently exonerated by the ALJ's decision after a level four administrative hearing. As a result, she was ordered reinstated to her previous position with full back pay. Consequently, she argued that the administrative exoneration should bar the Prosecuting Attorney from pursuing a criminal battery charge against her.

In Syllabus.1, our Supreme Court set out the specific elements necessary for the doctrine collateral estoppel to bar claim:

- “1. Collateral estoppel will bar a claim if four elements are met: (1) the issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior claim; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.”

The Court further set out in Syllabus.4, the elements required for collateral estoppel to attach to determinations of administrative agencies:

- “4. For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where is no statutory authority directing otherwise, the prior decision must be rendered pursuant to the agency’s adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a Court. In addition, the identity of the issues litigated is a key component to the application of administrative res judicata or collateral estoppel.”

In *Ruble*, our Court again cited in Syllabus.1, the specific requirements from *State v. Miller* establishing the four conditions required for collateral estoppel to be applicable.

Based upon the foregoing standards set out by our Court in *State v. Miller* and *Ruble v. Rust Oleum*, it is clear that the final resolution of the Decedent’s living claim in Claim Number 2019020262-OD, now bars the Dependent’s claim for benefits in Claim Number 2022005028-OD Fatal. More particularly, upon review of the four elements in Syllabus.1 of *State v. Miller* and *Ruble v. Rust Oleum*, the instant claim for Dependent’s benefits squarely meets those elements.

First, the underlying causation issue in the Decedent’s living claim, was identical to the underlying causation issue in the Dependent’s claim for benefits. Based upon the March 16, 2020 medical review performed by Dr. Ranavaya (Appendix 4) an Order was entered rejecting the application for occupational disease benefits in the living claim, finding that there was no evidence of a direct causal connection between the Decedent’s cancer and her alleged work place exposures. Upon her death, the instant Dependent’s claim was filed by her surviving spouse again asserting that her death was due to colorectal cancer caused by exposure to chemicals at Union Carbide. The instant Dependent’s claim was rejected on the same basis as the Decedent’s living claim, relying upon the medical review report of Dr. Ranavaya (Appendix 4) and his

opinion that there was no credible or reliable evidence to establish that the Decedent's colon cancer diagnosis was causally related to her employment.

Additionally, contrary to the reasoning in the Order which denied the Employer's Motion to Dismiss, the separate nature of a dependent's claim does not preclude the applicability of the doctrine of collateral estoppel to the instant claim. The same is true of the Court's reasoning in *Staubs v. State Workers' Compensation Commissioner* which is cited by the Board of Review as the reason for denying the applicability of collateral estoppel in this claim. It should also be noted that the Court's decision in *Staubs* was based upon the doctrine of res judicata or claim preclusion and not collateral estoppel or issue preclusion. In the instant claim, where the issue is the same, (i.e. whether the Decedent's colon cancer was occupationally induced) and the party against whom the doctrine is invoked, was a party or in privity with the party to the prior action, collateral estoppel will apply.

Second, there was a final adjudication on the merits in the underlying occupational disease claim when the Decedent's protest was withdrawn to the June 5, 2020 rejection order. The withdrawal of that protest rendered the Claims Administrator's Order of June 5, 2020, the final order on the merits of this claim. *West Virginia Code* § 23-5-1 specifically states that the action of a self-insured Claims Administrator is final unless that decision is protested within the requisite period of time. The withdrawal of the Decedent's protest to that ruling rendered the June 5, 2020 ruling as the final decision in that claim for benefits as though no protest was filed.

The third element of collateral estoppel is establishing that the Dependent was clearly in privity with the Decedent in the prior action. More specifically, pursuant to the provisions of *West Virginia Code* § 23-4-6(g), if a Claimant who has been granted an award of permanent disability dies, the unpaid balance of that award is to be paid to the Claimant's dependents. In

this claim, had the Decedent's protest been pursued by the Dependent, and had he prevailed on the causation issue, the Decedent would have been entitled to an award of permanent disability benefits from the date the Decedent last worked until the date of her death. The withdrawal of the Decedent's protest to the rejection order in the living claim, was in effect a surrender of the right of the Dependent to pursue and collect any such benefits that would have been due to the Decedent had the rejection order been reversed and the claim held compensable.

Finally, the litigation in the Decedent's living claim was only terminated upon the withdrawal of the Decedent's protest. In this claim, the doctrine of collateral estoppel is raised against the party who had the authority to pursue additional benefits in the living claim and determined to withdraw that protest and not pursue such benefits. Therefore, it is clear that the Dependent had a full and fair opportunity to litigate the issue of causation in the prior claim. Additionally, it clear that the "identity of the issues litigated" was met in that exact same issue, the causation of the Decedent's colorectal cancer, was the primary issue in both claims.

Therefore, based upon the foregoing principles of law, it is the Employer's position that the withdrawal of the Decedent's protest and the entry of the subsequent dismissal order on August 27, 2021, rendered the Dependent's claim moot as the issue regarding the direct causal connection between the alleged exposures at work and the development of colorectal cancer, was resolved in the prior living claim. Whether a Dependent's claim is a separate and distinct entity from a prior claim for occupational disease benefits, the fact is, in this case, the Dependent had a fair opportunity to litigate the issue of causation and chose to withdraw the Decedent's protest to that issue rendering the initial decision of the Claims Administrator, which was based upon a medical review report by Dr. Ranavaya, the final decision with regard to whether a causation

link between the Claimant's alleged exposures at work and her development of colorectal cancer, existed.

B. THE MAY 30, 2024 FINAL ORDER OF THE BOARD OF REVIEW, WAS CLEARLY WRONG IN VIEW OF THE RELIABLE PROBATIVE AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD.

Our West Virginia Supreme Court has consistently held that the burden of establishing a claim for workers' compensation benefits rests upon the person who asserts it. *Clark v. State Workmen's Compensation Commissioner*, 155 W.Va. 726, 187 S.E.2d 213 (1972). The difficulty in administering this burden arises in interpreting the evidence in light of the provisions of *West Virginia Code* § 23-4-1g. That code section provides that the resolution of any issue shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the manner of resolution. Under those circumstances an issue will not be resolved by allowing certain evidence to be dispositive simply because it is reliable and most favorable to the claimant's interest. Only after weighing the evidence and finding that an equal amount of evidentiary weight exists, will the resolution that is most consistent with the claimant's position be adopted. *West Virginia Code* § 23-4-1g.

This Court has also consistently held that the evidence when considered as a whole, must be sufficient to "make a reasonable person conclude that the claimant has established his claim." *Eady v. State Workmen's Compensation Commissioner*, 148 W.Va. 5, 132 S.E.2d 642 (1963). Furthermore, it must be remembered that the Commissioner is not bound by the conclusions stated in a single physician's report, but rather must make an independent determination based upon all of the evidence in the claim. *Haines v. State Workmen's Compensation Commissioner*, 151 W.Va. 152, 150 S.E.2d 883 (1966).

Although the employer must take the employee as he finds them -- with all of his attributes and all of his previous infirmities, the employer by subscribing to the Workers' Compensation Fund does not thereby become the employee's insurer against all ills or injuries that may befall him. *Jordan v. State Workmen's Compensation Commissioner*, 156 W.Va. 159, 191 S.E.2d 497 (1972). The Workers' Compensation Fund was created and exists only for the payment of compensation for injuries and is not a health and accident fund. *Barnett v. State Workmen's Compensation Commissioner*, 153 W.Va. 796, 172 S.E.2d 698 (1970).

West Virginia Code § 23-5-12(a) provides that this Honorable Court may reverse the findings of the Board of Review if it is found that the Board's decision is in violation of the statute or contains other legal error, is clearly wrong in view of the reliable, probative, and substantial evidence on the whole record, or is arbitrary, capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. *West Virginia Code* § 23-5-12(a).

Based upon these principles of law, the Employer respectfully submits that the Dependent has failed to establish by proper and satisfactory evidence the necessary connection between the Decedent's alleged exposure at work and her development of colon cancer. Consequently, the Board of Review committed error in reversing the rejection order and ordering that Dependent's benefits be granted.

More particularly, the report submitted by the Employer prepared by Dr. Mohammed Ranavaya (Appendix 4) dated March 16, 2020, along with the report of Dr. Eric Christenson (Appendix 12) dated June 1, 2023 as well as the reports of Dr. Dominik Alexander (Appendix 13) and Dr. Jennifer Sahmel (Appendix 17), all support the Employer's position. The reports of Dr. Ranavaya and Dr. Christenson contain very similar conclusions in which they both determine that the Claimant's development of colorectal cancer was likely due to non-occupational factors

and that it was an ordinary disease of life brought on by the Claimant's lifestyle and obesity and not due to any exposure to chemicals. Specifically, Dr. Ranavaya opined on Page 8 of his report that he found no credible or reliable evidence in the records to support the allegation that the Decedent suffered an occupational disease including colon cancer as a results of the alleged exposure to chemicals at work.

In his report summary, Dr. Christenson concluded that there were multiple risk factors that may have contributed to the Decedent's cancer including obesity, prior smoking history and following a western diet. Dr. Christenson concluded that the location of the Decedent's tumor, it's subtype and risk factors represented a common presentation of early onset colorectal cancer and "does not raise particular suspicion for presence of additional theorized causative factors."

In addition to the opinions of Drs. Ranavaya and Christenson as expressed in their reports and deposition testimony, the testimony of the Claimant's family physician Dr. Sean DiCristofaro (Appendix 7) was taken by deposition. In that deposition, Dr. DiCristofaro testified he had no specific knowledge of the Decedent's chemical exposures at work and he had reviewed no MSDS sheets or information regarding her occupational exposure. Finally the testimony of Dr. Narender Jogenpally (Appendix 8), the Claimant's treating oncologist, was also taken by deposition. He indicated that he did not discuss any potential risk or cause for the developmental colon cancer with the Decedent.

Based upon the foregoing, the Employer respectfully submits that the Dependent failed to establish by proper and satisfactory evidence that the Decedent's developmental of colon cancer was caused by work place exposure while working for the Employer. Therefore, the Employer respectfully submits that the final order entered by the Board of Review reversing the rejection

order and ordering that Dependent's benefits be granted, was entered in error and should therefore be reversed.

Respectfully submitted,

UNION CARBIDE CORPORATION,
a subsidiary of THE DOW CHEMICAL COMPANY

By Counsel,

/s/ Timothy E. Huffman

Timothy E. Huffman
JACKSON KELLY PLLC
Post Office Box 553
Charleston, WV 25322
tehuffman@jacksonkelly.com
Direct Dial: 304-340-1301
Fax: (304) 340-1044
Bar # 1814

Counsel for the Petitioner,
UNION CARBIDE CORPORATION,
a subsidiary of THE DOW CHEMICAL COMPANY

CERTIFICATE OF SERVICE

I certify that on June 28, 2024, the foregoing *Brief in Support of the Petition for Review on Behalf of the Petitioner*, was served upon the following using the File & Serve Xpress System, or by electronic mail as indicated:

Via File & Serve Xpress System

C. Casey Forbes, Clerk of Court
Intermediate Court of Appeals
West Virginia Judicial Tower
4700 MacCorkle Avenue, SE
Charleston, West Virginia 25304

Via File & Serve Xpress System and Electronic Mail

R. Dean Hartley, Esquire
Hartley Law Group, PLLC
The Wagner Building
2001 Main Street, Suite 600
Wheeling, West Virginia 26003

Via Electronic Mail

Mr. Ed Pauley
Claims Adjuster
SmartCasualtyClaims

Ms. Stacy McKeon
The Dow Chemical Company

/s/ Timothy E. Huffman

TIMOTHY E. HUFFMAN