IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v.

No.: 24-ICA-269

CHRISTINA DEARIEN (Decedent)
THOMAS DEARIEN (Dependent),

JCN: 2022005028
BOR Order: May 30, 2024

Respondent.

RESPONSE BRIEF ON BEHALF OF
CHRISTINA DEARIEN (Decedent) and
THOMAS DEARIEN (Dependent)

R. Dean Hartley (WV Bar # 1619)
HARTLEY LAW GROUP, PLLC
7 Pine Avenue
Wheeling, WV 26003
(304) 233-0777 // (304) 233-0774 (fax)
dhartley@hartleylawgrp.com
Counsel for Respondent Christina Dearien (Decedent)/
Thomas Dearien (Dependent)

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STATEMENT OF THE CASE

Respondent supplements Petitioner's Statement of the Case as follows:

Christina Dearien was 45 years old when she began experiencing abdominal pain and diarrhea. She had no significant family history of cancer except a grandparent who smoked and developed lung cancer. She had a 7-pack year exposure to tobacco having stopped smoking in 2009 – nine years prior to her colorectal cancer (CRC) diagnosis. Genetic testing for 25 genes associated with hereditary cancer was negative[1]. She had no history of diabetes, was never diagnosed with polyps, and was never diagnosed with inflammatory bowel disease. She was not a regular drinker of alcohol. Her occupational exposure to surfactants and various toxic carcinogens while employed at Union Carbide Corporation's (UCC) South Charleston facility outweighed her smoking and BMI contributions to the cancer.[2] She developed colorectal cancer on October 8, 2018 at the age of 46 years old, and passed as a result of her CRC on June 2, 2021 after a three-year battle with the disease.

Thomas Dearien filed an occupational disease dependent death benefits claim on September 10, 2021 resulting from the death of his wife. Claimant introduced reports from experts in the areas of industrial hygiene, microbiology/immunology, occupational medicine, medical toxicology, and medical oncology concluding that Mrs. Dearien's colorectal cancer and resultant death were caused from her significant occupational exposures to the toxic chemicals in her workplace. Numerous scientific studies were introduced to show that exposure to the cresols, ethylene oxide, surfacants, propylene oxide, and aromatic hydrocarbons (benzene & toluene)

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[1]See Finley Report p. 1. Respondent Deariens' Appendix 000059 hereinafter "Resp. App."

[2]See Timur C. Durrani June 13, 2023 Deposition p. 122-123. Resp. App. 000096-97.

caused or contributed to Mrs. Dearien's colorectal cancer. Additionally, internal UCC studies were introduced to support a causal relationship between Mrs. Dearien's occupational exposure and her development of CRC, and resultant death.

Respondent's burden of proof required that he demonstrate that his wife contracted an occupational disease that contributed in any material degree to her death. *See Bradford v. Workers' Compensation Com'r*, 185 W. Va. 434, 408 S. E.2d 13 (1991) (emphasis added). Based upon the weight of the evidence, Respondent met his burden, and the claim was ruled compensable. The Employer disagrees and has filed this appeal.

SUMMARY OF ARGUMENT

This appeal concerns the application of W. Va. Code § 23-4-1g(a) (2003), the evidentiary weight given to competing expert opinions where none of the reports submitted into evidence was discredited, and arguably the application of collateral estoppel.

Petitioner raises a causation inquiry by asserting that "the Dependent failed to establish by proper and satisfactory evidence that the Decedent's development[ ] of colon cancer was caused by work place exposure while working for the Employer." Petition p. 11. As support for its alleged causation error, Petitioner contends that a review of its evidence demonstrates more reliable support for the proposition that causation was not established. Petitioner's alleged causation error is without merit in light of the Board of Review (BOR) holding that:

> The evidence regarding a causal link between the chemicals Ms. Dearien was exposed to at UCC/Dow and the development of colorectal cancer is mixed. The parties' experts have equally impressive credentials, experience, and expertise. It cannot be found that one side's panel of experts is notably more qualified or more credible than the other. Based upon the evidence of record, it is found that an equal amount of evidentiary weight exists, and

> pursuant to W.Va. Code § 23-4-1g, the resolution that is most consistent with the claimant's position must be adopted.

BOR Order pp. 35-36. Resp. App. 000305-306.

Additionally, contrary to the holding of *Staubs v. State Workers' Compensation Commissioner*, 153 W. Va 337, 168 S. E.2d 730 (1969), the employer contends that where a worker's occupational disease claim protest is withdrawn as a result of the worker's death prior to a ruling by the Board of Review, the dependent is unable to prosecute a dependent's fatal death claim under Petitioner's view of collateral estoppel. Petitioner's contention is against the weight of authority which has held consistently that a dependent's claim is separate and distinct from the underlying worker's claim.

The Board of Review correctly weighed all of the evidence in accordance with the applicable statutes and held the claim compensable. Petitioner has failed to demonstrate that the Board of Review's decision met any of the statutory reasons justifying reversal.

STATEMENT REGARDING ORAL ARGUMENT

The Respondent agrees with Petitioner that oral argument is not necessary.

ARGUMENT

A. Legal Authority.

1. Standard of Review.

The standard of review for this matter is contained in W. Va. Code § 23-5-12a(b) (2022) which permits a reversal of the BOR's decision if the Petitioner establishes that 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.

2. Weight of the Evidence.

"W. Va. Code § 23-4-1g(a) requires evidence to be assessed in terms of relevance, credibility, materiality, and reliability. The statute simply does not permit the report of one physician, or in this instance, two physicians, to be deemed unreliable and essentially ignored simply because it contradicts the report of another physician." *Wilkinson v. West Virginia Office Ins.*, 222 W. Va. 394, 664 S. E.2d 735, 742 (2008).

"[W]here multiple reports are of record and none are explicitly discredited . . . all of the expert reports were entitled to equal evidentiary weight, and, accordingly, the application of West Virginia Code § 23-4-1g was proper." *Bayer Corporation v. Charles Virden*, No. 22-ICA-21 (W. Va. Intermediate Court of Appeals Nov. 15, 2022) (memorandum decision) at *4 *affd Bayer Corporation v. Charles Virden*, No. 22-949 (W. Va. Supreme Court June 10, 2024) (memorandum decision) citing *Williams v. Performance Coal Co.*, No. 15-0288, 2016 WL 765751 (W. Va. Supreme Court Feb. 26, 2016) (memorandum decision).

3. Fatal Occupational Disease and Proving Causation.

"[T]he causal connection for occupational diseases must be established by showing exposure at the workplace sufficient to cause the disease and that the disease actually resulted in the particular case." *Marlin v. Bill Rich Const., Inc.*, 198 W. Va. 635, 646, 482 S. E.2d 620, 631 (1997) citing Syl. pt. 2, in part, *Powell v. State Workmen's Compensation Commissioner*, 166 W. Va. 327, 273 S. E.2d 832 (1980).

Respondent was not required "to prove that the conditions of his [decedent's] employment were the exclusive or sole cause of the disease." Syl. pt. 3, *Powell*, *supra*. *Hoult, Id.*, 181 W. Va. at 554, 383 S. E.2d at 519. Furthermore, "[a] claimant in an occupational disease case is not required to negative all possible non-occupational causes of the disease." Syl. pt. 4, *Powell*, *supra*. *See Hoult, Id*.

Respondent's burden of proof, in establishing his claim, merely required that he demonstrate that his wife contracted an occupational disease that contributed, in any material degree, to her death. *See Bradford v. Workers' Compensation Com'r*, 185 W. Va. 434, 408 S. E.2d 13 (1991).

4. Claims Adjuster Decision is not a quasi-judicial determination.

For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there 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 identicality of the issues litigated is a key component to the application of administrative res judicata or collateral estoppel. Syl. pt. 1 *Vest v. Bd. of Educ of the County of Nicholas*, 193 W. Va. 222, 455 S. E. 2d 781 (1995).

"[A] **Claim Administrator's decision cannot be given preclusive effect** because it cannot be considered a "quasi-judicial" or administrative decision . . . Claim administrators are employed by "self-insured employers. . . " *Corley v. E. Associated Coal Corp.*, 2009 WL 723120 at *16 n.1 (N.D.W. Va. March 18, 2009). "A claimant denied benefits by a claim administrator can 'protest' that decision to the Board of Judges, which is the administrative agency. Thus, only

a decision by the Board of Judges, or the Board of Review which reviews decisions by the Board of Judges, may be given preclusive effect. *Corley*, *Id.* at n.1 (emphasis added).

5. Dependent benefits are separate and distinct under the West Virginia Workers' Compensation Act.

A claim for disability benefits and a claim for death benefits are separate and distinct, and the claimant's application for fatal dependent's benefits is not derived from or dependent upon the outcome of the claim filed by Ms. Dearien. *Staubs v. State Workmen's Compensation Comm'*r, 153 W. Va. 337, 168 S. E.2d 730 (1969).

B. Petitioner's Asserted Errors.

Petitioner presents a two-pronged attack of the West Virginia Workers' Compensation Board of Review's May 30, 2024 finding of compensability in this dependent's fatal benefit claim: (1) the withdrawal of the underlying occupational disease claim after Mrs. Dearien's death precludes the fatal dependent's benefit claim under a collateral estoppel attack; and (2) the employer's evidence is more probative than the claimant's/dependent's evidence. Neither assertion justifies reversal.

C. The Board of Review was not clearly wrong as to the inapplicability of collateral estoppel.

1. Timeliness of the employer's appeal based on collateral estoppel.

At the outset, there exists a question as to the timeliness of the Petitioner's asserted error based on collateral estoppel. Petitioner acknowledges the March 29, 2023 Board of Review Order denying its previously-filed motion to dismiss on collateral estoppel grounds. Petition p. 7. W. Va. Code § 23-5-12a(a) (2022) provides that "the aggrieved party shall file a written notice of appeal with the Intermediate Court of Appeals . . . within 30 days after receipt of notice

of the action complained of." Moreover, W. Va. Rule of Appellate Procedure 12(b) states that "No appeal shall be presented from a decision of the Workers' Compensation Board of Review to the Intermediate Court that has been rendered more than thirty days before such appeal is filed with the Clerk." Finally, W. Va. Code § 23-5-10a (2022) sets forth a jurisdictional prerequisite that an appeal must be filed within 30 days of receipt of notice of the Workers' Compensation Board of Review's final action.

The Employer's Petition in this appeal was filed June 28, 2024, more than 30 days after the Board of Review's original ruling that first denied the Employer's use of collateral estoppel as a defense. No appeal was taken by the Employer from the March 29, 2023 Order. Therefore, assuming that the May 2023 Order was not interlocutory, the Petitioner's collateral estoppel argument is untimely and of no consequence.

2. Dependent Benefit Claims are Separate and Distinct from OD Claims.

Petitioner asserts generally that in a dependent fatal benefit claim "where the issue is the same, . . . 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." Petition p. 7. This argument was rejected by the Board of Review in March 2023.

Reaffirming the previous March 29, 2023 Hearing Examiner's ruling (Resp. App 000270), the Board of Review concluded that "the employer's argument that the claimant's application is moot pursuant to the doctrine of collateral estoppel . . . is not persuasive. A claim for disability benefits and a claim for death benefits are separate and distinct, and the claimant's application for fatal dependents' benefits is not derived from or dependent upon the outcome of the claim filed by Ms. Dearien citing *Staubs v. State Workmen's Compensation Comm'*r, 153 W. Va. 337, 168 S.

E.2d 730 (1969)." *See* BOR May 30, 2024 Order p. 32. Resp. App. 000302.

Staubs v. State Workers' Compensation Commissioner undercuts Petitioner's assertions. In *Staubs*, the Supreme Court of Appeal found no merit in the contention that the claim of a dependent widow is barred by the doctrine of *res judicata* when the decedent worker's claim was denied during his lifetime. The Court held that the decedent's "claim for compensation and the claim of the widow for benefits for herself and her children as his dependents are separate and distinct claims and her claim is not derived from or dependent upon the outcome of the claim filed by her husband." *citing Terry v. State Compensation Commissioner*, 147 W. Va. 529, 129 S. E.2d 529; *Gibson v. State Compensation Commissioner*, 127 W. Va. 97, 31 S. E.2d 555. The *Staubs* Court further found that the concept of privity between the two types of claims was negatived in *Lester v. (State) Compensation Commissioner*, 123 W. Va. 516, 16 S. E.2d 920. More importantly for this matter and the application of collateral estoppel, the Court held that "[t]he identity in the thing sued for; the identity of the cause of action; and the identity of the person and the parties to the proceeding **are not present**. . ." when a dependent files a claim for benefits after the decedent worker's own application for benefits. The lack of similarity between the two types of claims prevents the application of preclusion. *See Staubs v. State Workmen's Compensation Commissioner*, 153 W. Va. 337, 348-349, 168 S. E.2d 730, 736 (1969).

Accordingly, Respondent is not barred by the doctrine of collateral estoppel from asserting his claim for fatal dependent's benefits.

3. Collateral estoppel does not prevent the dependent's claim for fatal benefits.

Even assuming collateral estoppel is applicable in this situation, Petitioner has failed to

demonstrate the necessary elements for the application of the defense so as to justify a reversal of the BOR's May 30, 2024 Order.[3]

"Collateral estoppel will bar a claim if four conditions 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 action; (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." Syl. pt. 1 *Ruble v. Rust-Oleum Corporation, et al.*, Slip Op. No. 22-0329 (W. Va. June 12, 2024) citing Syl. pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S. E.2d 114 (1995).

The employer in the present appeal mistakenly asserts that there was a "final adjudication" on the merits of the prior claim; that the party against whom the doctrine is asserted (Mr. Dearien) was the same party or in privity with a party in the prior action (Mrs. Dearien); and that the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issues in the prior claim. *See generally*, Petition pp. 5-8.

a. There was no "final adjudication" on the merits of Mrs. Dearien's occupational disease claim.

The application of collateral estoppel requires Petitioner to prove that "there [was] a final adjudication on the merits of the prior action." Petitioner contends that the claims adjuster's June

[3]The Kanawha County Circuit Court denied the employer's original attempt to dismiss the underlying companion civil lawsuit filed by Mr. Dearien pursuant to W. Va. Code § 23-4-2 (2015) on collateral estoppel grounds as well. *Thomas G. Dearien v. Union Carbide Coporation, et al.*, Civil Action No. 19-C-433 (Kanawha County, W. Va. Circuit Court, May 12, 2022 Order). The Circuit Court ruling was brought before the West Virginia Supreme Court of Appeals by the employer on a writ of prohibition which was ultimately denied. *State of West Virginia ex rel Union Carbide Corporation, et al v. Honorable Tera Salango Circuit Court of Kanawha County, et al.* No. 22-612 (October 7, 2022 Order)(denying writ of prohibition).

5, 2020 Order became a final adjudication of the merits of the occupational disease claim when the Workers' Compensation Office of Judges granted claimant's motion to withdraw the protest and dismissed Mrs. Dearien's protest of the claims adjuster's order on August 25, 2021.

Mrs. Dearien timely protested the claims adjuster's order, which remained pending at the time of her death, and thus extinguished at such time. Mr. Dearien subsequently filed his own fatal dependent's benefits claim. Mrs. Dearien's occupational disease claim was not finally adjudicated on the merits by an administrative agency, and therefore, the second element of the *Miller* test was not satisfied.

i. Mrs. Dearien timely protested the claims adjuster's order denying her occupational disease claim, which prevented such order from becoming a final order.

When a claims adjuster denies a workers' compensation claim, the ensuing process follows: an order is entered, the aggrieved party has 60 days to protest the order, and unless a protest is filed the order becomes final. *See* W. Va. Code § 23-5-1(b). The June 5, 2020 Self Insured Employers Decision denying Mrs. Dearien's occupational disease claim established a sixty (60) day protest period during which Mrs. Dearien could protest such decision to the Office of Judges. Resp. App. 000266. Mrs. Dearien timely protested the decision on July 31, 2020; therefore, it did not become a final order. Resp App. 000267.

ii. After Mrs. Dearien's death, her occupational disease claim was withdrawn before any quasi-judicial determinations were made rgarding her occupational disease claim.

Following the July 31, 2020 protest of the claims adjuster's decision, Mrs. Dearien's occupational disease claim was in litigation before the Workers' Compensation Office of Judges. At no time did the Workers' Compensation Office of Judges issue an order containing findings of

fact or conclusions of law related to the protest.

Under West Virginia law, "[q]uasi-judicial administrative decisions can be considered 'final adjudications' for the purpose of res judicata and collateral estoppel." *Corley v. E. Associated Coal Corp.*, 2009 WL 723120 (N.D.W. Va. Mar. 18, 2009) (citing *Liller v. West Virginia Human Rights Comm.,* 376 S. E.2d 639, 646 (W. Va. 1988)). However,

> For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there 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 identicality of the issues litigated is a key component to the application of administrative res judicata or collateral estoppel.

Corley v. E. Associated Coal Corp., 2009 WL 723120 (N.D.W. Va. Mar. 18, 2009) (citing Syl. pt. 2, *Vest v. Bd. Of Educ. of the County of Nicholas,* 455 S. E.2d 781 (W. Va. 1995).

The *Corley* court rejected the employer's bid for the application of collateral estoppel, clearly stating that a claim administrator's decision could not be given preclusive effect:

> Although the **Claim Administrator** issued alternative grounds for denying Mrs. Corley's claim, that **decision cannot be given preclusive effect because it cannot be considered a "quasi-judicial" or administrative decision.** Claim administrators are employed by "self-insured employers," in this case Eastern, to review and investigate claims. See W. Va. Code § 23-5-1. A claimant denied benefits by a claim administrator can "protest" that decision to the Board of Judges, which is the administrative agency. Thus, only a decision by the Board of Judges, or the Board of Review which reviews decisions by the Board of Judges, may be given preclusive effect. See Syl. Pt. 2, Vest, 455 S. E.2d 781.

Id. at n. 1. (emphasis added).

Petitioner seeks to elevate the Self-Insured Employer Decision made by the claims adjuster on September 24, 2021 to one with preclusive effect. Petition pp. 3 & 6. However, the Workers'

Compensation Office of Judges did not affirm (or even consider) the merits of the claims adjuster's decision in Mrs. Dearien's occupational disease claim. Rather, after being protested by Mrs. Dearien, the occupational disease claim was withdrawn based on Mrs. Dearien's death, without prejudice to Mr. Dearien's independent statutory right to file a fatal dependent's benefits claim predicated on Mrs. Dearien's development of and death from colorectal cancer. In fact, the withdrawal of such claim is expressly contemplated by the procedural rules governing claims pending before the Workers' Compensation Office of Judges: "Upon motion of any party, upon request of the protesting party, or as a sanction permitted the Office of Judges by these rules, any protest pending before the Office of Judges can be dismissed from litigation." W. Va. C.S.R. § 93-1-14.1.

b. Mr. Dearien was not a party or in privity with Mrs. Dearien in relationship to Mrs. Dearien's occupational disease claim.

The third element of the *Miller* test requires the party moving for the application of collateral estoppel prove that "the party against whom the doctrine is invoked was a party or in privity with a party to a prior action." Mr. Dearien was not in privity with Mrs. Dearien, in the context of Mrs. Dearien's prior workers' compensation occupational disease claim.

Petitioner maintains that Mr. Dearien was somehow in privity with Mrs. Dearien because he could have pursued an unpaid balance of a permanent disability award to Mrs. Dearien had she been granted such an award pursuant to W. Va. Code § 24-4-6(g). Petition p. 8. The fallacy of Petitioner's argument is that **no award was ever granted**. Petitioner suggests, without any authority, that Mr. Dearien could not withdraw his wife's occupational disease claim upon her death and pursue his own fatal dependent's benefit claim. Instead, Petitioner uses what is almost a

"Woulda, Coulda, Shoulda" Argument against Mr. Dearien's right to dependent's benefits, *i.e.*, had Mr. Dearien not withdrawn the protest, had Mr. Dearien pursued the OD claim of his wife, and had he prevailed on the causation issue – he would have been entitled to an award of permanent disability benefits from Mrs. Dearien's last date of employment until her death. Instead, in keeping with the prior rulings of the West Virginia Supreme Court of Appeals, Mr. Dearien simply filed his own independent claim for dependent benefits as a result of his wife's untimely death as was his right.

The Supreme Court of Appeals has previously considered the distinct nature of a fatal dependent's benefits claim and indicated that "[The injured wife's] claim for compensation and the claim of the widow[er] for benefits for [himself] . . . as [her] dependent[ ] are separate and distinct claims and [his] claim is not derived from or dependent on the outcome of the claim filed by [his wife]." *Staubs v. State Workmen's Compensation Commissioner,* 153 W. Va. at 348, 168 S. E.2d at 736.

The statutory scheme enacted by the Legislature contemplates the disparate nature of an employee's workers' compensation claim and a fatal dependent's benefits claim that may be pursued by the injured employee's dependents following the employee's death. The West Virginia Code further provides a statute of limitations applicable to fatal dependent's benefits claims premised upon a deceased employee's occupational disease that caused the employee's death. The dependent must file his or her application for such benefits within one year of the employee's death. W. Va. Code § 23-4-15(c).

Notwithstanding Petitioner's assertions that Mr. Dearien was a "party" to Mrs. Dearien's occupational disease claim, it is clear that Mr. Dearien was not a party to such claim. By operation

of law, any potential benefits to which Mrs. Dearien was entitled would not have vested in her estate. Moreover, Mr. Dearien would not have been permitted to substitute himself in Mrs. Dearien's place to pursue fatal dependent's benefits within the context of Mrs. Dearien's occupational disease claim. Rather, Mr. Dearien was required to file his own statutory fatal dependent's benefits claim, and such claim just happens to be premised on Mrs. Dearien's occupational disease that was also the subject of her own distinct occupational disease claim.

c. Mr. Dearien did not have a full and fair opportunity to litigate Mrs. Dearien's occupational disease claim. In that vein, Mr. Dearien has a statutory right to pursue a fatal dependent's benefit claim, and such right only accrued at the time of Mrs. Dearien's death.

The fourth element of the *Miller* test governing the application of collateral estoppel requires that "the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." Mr. Dearien did not receive a full opportunity to litigate Mrs. Dearien's occupational disease claim because he was not a party to such claim. After Mrs. Dearien's death extinguished her claim, Mr. Dearien filed his own fatal dependent's benefit claim.

As the above discussion makes clear, Mrs. Dearien was the party to her occupational disease claim until her death. As a result of her death, West Virginia's statutory scheme dictated that any right to compensation did not vest in Mrs. Dearien's estate; rather, there was merely the potential that any compensation that would have been payable to Mrs. Dearien until the date of her death, if she had lived, could be payable to her dependents. Given this system, as well as the fatal dependent's benefits claim provided by the statutory workers' compensation system, it is clear that Mr. Dearien did not have a full and fair opportunity to litigate his wife's occupational disease claim. Instead, Mr. Dearien filed a fatal dependent's benefit claim, which accrued at the time of

his wife's death, and which is the mechanism by which a dependent widower may seek workers' compensation benefits premised upon an employee's death resulting from an occupational disease. *See Jordan v. State Workmen's Compensation Comm'r,* 165 W. Va. 199, 271 S. E.2d 604 (1980) ("We do not disagree that the date of the employee's death is the date that his dependent's claim comes into existence.")

d. Collateral Estoppel Conclusion.

Assuming that a collateral estoppel analysis is even appropriate in this appeal, three of the four elements of the collateral estoppel test set forth in *Miller* are not present: there was no "final adjudication" on the merits of the prior claim; Mr. Dearien was not the same party or in privity with Mrs. Dearien in the prior claim; and Mr. Dearien did not have a full and fair opportunity to litigate the issues in Mrs. Dearien's prior claim. Petitioner has failed to prove the collateral estoppel elements necessary to bar Mr. Dearien's fatal dependent's benefit claim.

D. Respondent demonstrated that his Decedent's disease and death were the result of her exposure to chemicals in the workplace. The evidence introduced by the Petitioner was not more probative than the Respondent's evidence.

Petitioner argues that Mr. Dearien 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 [and her ultimate passing]." Petition p. 10. Petitioner disagrees with the Board of Review's assessment, the weight attached to Respondent's expert analyses[4], and suggests in a three-paragraph summary that its experts' opinions are better and necessitate reversal. Petition pp. 10-11.

[4]A complete explanation of the experts' opinions can be found in Respondent's Closing Statement before the BOR. Resp. App. 000001-000048. *See also*, Respondent Dearien's' Appendix items two (2) through 19 which provide further causation support. Resp. App. 000049-000262.

The analysis of Petitioner's asserted error begins with an appreciation that in a workers' compensation appeal substantial deference is given to the factual findings of the Board of Review by the Intermediate Court of Appeals. *See Bayer Corporation v. Charles Virden, Id.* at *4. In reality there has been no showing by the Petitioner that the Board of Review was clearly wrong in its conclusions, that it improperly weighed the evidence, or that any report of the Respondent's experts were explicitly discredited. Quite the contrary, the Petitioner simply disagrees with the Board of Review's conclusions on causation.

The Board of Review concluded that the reports and/or testimony of Drs. DiCristofaro, Arthur, Durrani, and Finley support a finding that Mrs. Dearien's occupational exposures caused or materially contributed to her colorectal cancer as demonstrated by the following BOR findings:

- Dr. DiCristofaro [Mrs. Dearien's treating physician] opined that Ms. Dearien's colon cancer was an occupational disease related to her chemical exposures while working at UCC/Dow. Although Dr. DiCristofaro conceded that he had no knowledge of the specific chemicals Ms. Dearien was exposed to during her employment, he stated that his biggest concern regarding the etiology of her cancer diagnosis was potential environmental exposures related to her employment. The claimant underwent genetic testing which revealed no genetic predisposition for colon cancer. Additionally, she did not have a family history of colon cancer and her cancer diagnosis occurred earlier than would have been expected from a statistical standpoint.

- Dr. Arthur [Respondent's expert toxicologist] opined to a reasonable degree of medical certainty that Ms. Dearien's occupational exposure was a significant contributing factor in causing her development of colorectal cancer. Dr. Arthur testified that Ms. Dearien's deposition established that she was exposed to numerous chemicals during her employment that were either carcinogenic or capable of causing harm to the gastrointestinal tract. Specifically, Dr. Arthur stated that the major contributors to Ms. Dearien's cancer were her exposures to cresols, ethylene oxide, propylene oxide, solvent 23855, and TMI

Meta in combination with or as part of the various surfactant product lines that acted as a delivery system for the gastrointestinal-injuring chemicals. Dr. Arthur noted that the evidence is very clear that the surfactant exposure thins and makes more porous the gut mucous, thereby promoting inflammation and colon cancer.

- Dr. Durrani [Respondent's expert occupational physician and medical toxicologist] opined to a reasonable degree of medical certainty that Ms. Dearien's intense, frequent, and proximate occupational exposure to surfactant products and their ingredients was a significant contributing factor in causing her development of colorectal cancer. Specifically, he noted that Ms. Dearien's exposures to cresols, ethylene oxide, propylene oxide, solvent 23855 and sodium methabisulfite were capable of causing cancer in humans, and Ms. Dearien's exposures to these chemicals was intense, frequent, and proximate. Dr. Durrani noted that his conclusion was based upon epidemiological evidence and the application of the Bradford-Hill criteria which suggested a strong epidemiological association and causality. He supported Dr. Arthur's comments that exposure to surfactant products increase the absorption of carcinogenic chemicals and corroborated Dr. DiCristofaro's opinion that Ms. Dearien's highest risk factor for the development of colorectal cancer was her occupational exposures at UCC/Dow.

- Dr. Finley [Respondent's expert oncologist] concluded to a reasonable degree of medical certainty that Ms. Dearien's occupational chemical exposures resulted in an elevated risk for bowel cancer and more likely than not substantially contributed to her development of colon cancer. Specifically, Dr. Finley noted that chemicals Ms. Dearien was exposed to – such as cresol, ethylene oxide, and propylene oxide – are known human carcinogens. He further noted that Ms. Dearien handled solvents containing aromatic hydrocarbons which are associated with the development of colon and rectal cancer. He noted that these chemical compounds are absorbed directly through the skin and the respiratory epithelium and distributed throughout all the organs and tissues of the body.

BOR Order pp. 34-35. Resp. App. 000304-305.

The Board further explained that in support of the position that Ms. Dearien's occupational exposures did not cause her cancer, the employer relies upon the findings of Drs. Ranavaya, Christenson, and Alexander.[5] BOR Order p. 35. Resp. App. 000305.

Ultimately, as to the various materials and experts presented, the Board found that:

> The evidence regarding a causal link between the chemicals Ms. Dearien was exposed to at UCC/Dow and the development of colorectal cancer is mixed. The parties cite studies, articles, and medical evidence supporting their position. The parties' experts have equally impressive credentials, experience, and expertise. It cannot be found that one side's panel of experts is notably more qualified or more credible than the other. Based upon the evidence of record, it is found that an equal amount of evidentiary weight exists, and pursuant to W. Va. Code § 23-4-1g, the resolution that is most consistent with the claimant's position must be adopted.
>
> Ms. Dearien's colorectal cancer was more likely than not causally related to her occupational exposures at UCC/Dow. Ms. Dearien died as a result of colorectal cancer. The weight of the evidence establishes that Ms. Dearien's occupational exposures materially contributed to her death from colorectal cancer.

BOR Order pp. 35-36 (emphasis added). Resp. App. 000305-306.

As this Court has held, "[W]here multiple reports are of record and none are explicitly discredited . . . we find no error in the Board's determination that all of the expert reports were entitled to equal evidentiary weight, and, accordingly, the application of West Virginia Code § 23-4-1g was proper." *Bayer Corporation v. Charles Virden*, *Id.* at *4 citing *Williams v. Performance Coal Co.*, *Id.* Nowhere has the Petitioner attempted to demonstrate that Respondent's expert reports or opinions were discredited by the BOR.

[5]A critique of the opinions and conclusions of Drs. Ranavaya, Christenson, and Alexander can be found in Respondents' Closing Statement before the BOR. *See* § H, pp. 32-43. Resp. App. 000032-000043.

Here ". . . the [BOR] did not explicitly discredit any of the evaluation reports . . . [thus] all of the reports are entitled to equal evidentiary weight pursuant to West Virginia Code § 23-4-1g." As such, "the statute require[s] the dispute to be resolved by adopting the recommendation most consistent with [the claimant's] position." *Id.* at *4 (internal quotations omitted). Given the Petitioner's inability to discredit Respondent's expert reports, the conclusions of *Bayer Corporation* and *Williams* support the finding that the BOR's decision applying W. Va. Code § 23-4-1g in the present matter was appropriate.

E. Petitioner has Failed to Meet Its Burden of Establishing "Clearly Wrong".

Under W. Va. Code § 23-5-12a(b), Petitioner has the burden to establish with satisfactory proof that the BOR's decision was "clearly wrong in view of the reliable, probative, and substantial evidence on the whole record." Petitioner's attempt to meet that burden falls short of the mark. The evidence submitted by both parties was found to be comparable by the BOR, *i.e.,* both sides produced witnesses with "equally impressive credentials, experience, and expertise." As such, the Petitioner's assertions that its experts' positions and opinions hold more sway than Respondent's experts is incorrect. Indeed, Petitioner has merely attempted to argue the persuasiveness of it experts' opinions in three paragraphs by highlighting (without explaining) why its position is correct and the Board of Review's conclusion is "clearly wrong".

The Board of Review weighed all of the evidence presented by the parties, and after doing so concluded that the decisional scales were evenly situated permitting its discretionary application of W.Va. Code §23-4-1g(a). Petitioner has failed to establish that the reliable, probative, and substantial evidence when viewed as a whole record demonstrates that the Board of Review was "clearly wrong".

F. Mr. Dearien proved that his wife's employment contributed to her death.

Respondent met his burden of proof required by W. Va. Code § 23-4-1 and *Powell*, *supra,* as construed in light of W. Va. Code §23-4-1g(a) and demonstrated "Ms. Dearien's colorectal cancer was more likely than not causally related to her occupational exposures at UCC/Dow. Ms. Dearien died as a result of colorectal cancer. The weight of the evidence establishes that Ms. Dearien's occupational exposures materially contributed to her death from colorectal cancer." BOR Order p. 36. Resp. App. 000306.

CONCLUSION

Petitioner has failed to demonstrate that the Board of Review was clearly wrong or in error in view of the reliable, probative, and substantial evidence on the whole record as required by W. Va. Code §23-5-12a(b).

WHEREFORE, the Respondent respectfully requests that the May 30, 2024 Order of the Board of Review be affirmed.

Dated: July 26, 2024.

CHRISTIAN DEARIEN (Decedent)/
THOMAS DEARIEN (Dependent)
RESPONDENT

By: *R. Dean Hartley*

R. Dean Hartley (WV Bar # 1619)
HARTLEY LAW GROUP, PLLC
7 Pine Avenue
Wheeling, WV 26003
Phone: (304) 233-0777 // Fax: (304) 233-0774
dhartley@hartleylawgrp.com
Counsel for Respondent Christina Dearien (Decedent)/
Thomas Dearien (Dependent)

CERTIFICATE OF SERVICE

I, hereby certify that on the 26th day of July 2024, I served a true and correct copy of the foregoing Response Brief on Behalf of Respondent Christina Dearien (Decedent)/Thomas Dearien (Dependent) with the Clerk of this Court using the File & Serve Xpress system, or by electronic mail as indicated below:

Via File & Serve Xpress

Timothy E. Huffman, Esq.
JACKSON KELLY PLLC
Post Office Box 553
Charleston, WV 25322
tehuffman@jacksonkelly.com
Counsel for Petitioner

R. Dean Hartley

R. Dean Hartley (WV Bar # 1619)
HARTLEY LAW GROUP, PLLC
7 Pine Avenue
Wheeling, WV 26003
(304) 233-0777 // (304) 233-0774 [fax]
dhartley@hartleylawgrp.com
Counsel for Respondent Christina Dearien (Decedent)/
Thomas Dearien (Dependent)