

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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**CASE NO.**

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WADE BOYCE,

Petitioner,

JCN: 2023018621

vs.

DLE: 03/27/2023

QUINWOOD COAL COMPANY, LLC, Employer,

Respondent.

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PETITIONER'S BRIEF

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**BRIEF FILED ON BEHALF OF THE CLAIMANT**  
**FROM AN APPEAL OF A FINAL DECISION OF THE WEST VIRGINIA**  
**WORKERS' COMPENSATION BOARD OF REVIEW**

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## **INTRODUCTORY NOTE**

The Petitioner will be referred to as Claimant; the Workers' Compensation Board of Review will be referred to as BOR; the Administrative Law Judge will be referred to as ALJ; the third-party administrator will be referred to as CA; Quinwood Coal Company, LLC will be referred to as Employer; occupational pneumoconiosis will be referred to as OP; coal worker's pneumoconiosis is referred to as CWP; the Occupational Pneumoconiosis Board will be referred to as OP Board.

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## **ASSIGNMENT OF ERRORS**

THE BOR WAS CLEARLY WRONG FINDING CLAIMANT DID NOT PROVE TO A PREPONDERANCE OF EVIDENCE THAT HE WAS EXPOSED TO THE HAZARDOUS OCCUPATIONAL DUST DURING HIS EMPLOYMENT WITH THE EMPLOYER.

## **STATEMENT OF THE CASE**

An Employees' Report of OP dated March 27, 2023, states that Claimant was exposed to occupational dust hazards through his employment in the coal mining industry for around 15 years. **[Exhibit 1]**

In a Physician's Report of OP dated March 30, 2023, Dr. Spencer reported Claimant has a diagnosed impairment attributable to OP. **[Exhibit 2]**

An Employer's Report of OP dated April 11, 2023, noted Claimant was employed as a minter operator/section foreman in charge of safety, compliance and production on the section. The Employer stated it did not believe Claimant was exposed to excessive levels of dust. **[Exhibit 3]**

Results from a pulmonary function test dated December 11, 2018, and August 19, 2020, revealed mild obstruction. **[Exhibit 4]**

Pulmonary function tests from New River Breathing Center dated January 3, 2023, revealed mild obstruction, hyperinflation, and air trapping. **[Exhibit 5]**

Dr. DePonte's B reading of the Claimant's x-ray from January 3, 2023, found no pleural or parenchymal abnormalities consistent with pneumoconiosis. **[Exhibit 6]**

By order of the CA dated May 5, 2023, the claim was rejected. **[Exhibit 7]**

Claimant testified by deposition on October 4, 2023, that he began working in an underground coal mine called Greenbrier Smokeless, in 2007. He moved to Greasy Creek mines in 2008 through 2013, when he went to Jackson

Bridge. After being laid off, he worked temporarily at a logging operation, but began working for Kingston mines in 2015 through 2016. In 2017, he worked for Maple Coal, and then he went back to Kingston in 2018. He testified that he was exposed to coal dust on a daily basis at every mining job. Claimant stated he began working for the Quinwood mines around November of 2021, and worked there until being laid off on September 1, 2023. The company was originally JCS Holdings, but Quinwood bought them out on March 31, 2022, although he worked at the same mine site from November 2021 through September 1, 2023. At that position, he worked as a miner operator for approximately one year and was exposed to occupational dust hazard on a daily basis. His job required him to check dust samplers on the operators twice a shift. He testified that he was not provided with appropriate breathing protection, but that he did obtain a respirator from a friend who worked at another mine and wore it 80-90% of the time when running a miner. He testified he personally wore a dust monitor and that once a quarter they conducted MSHA sampling, requiring them to run 15 consecutive samples. Claimant described that the dust exposure he had when he changed roles to a section foreman was less than when he was operating the miner. He stated he currently works for Alpha/Jerry's Fork. **[Exhibit 8]**

Employer submitted a March 13, 2024, report from James McIntosh, Certified Industrial Hygienist, which stated that after reviewing the results from the MSHA testing, he believed the sampling was representative of the Claimant's

exposure during his time at Quinwood Coal, and that the levels were below MSHA respirable dust standards. **[Exhibit 9]**

In a deposition taken May 5, 2024, Mr. McIntosh stated there were 9 samples from the time period Claimant worked for Employer. He testified that he got the samples from the public MSHA site. He stated that there was no way to know if the samples were taken specifically from the miner operated by Claimant or any other individual. He agreed that, other than the nine samples taken, there were no other dust samples taken the rest of the year. He testified that he believed the samples were taken using MSHA requirements, and it appeared that the samples had been taken by a an individual certified by MSHA, based solely on the fact that it was reported publicly by MSHA, and, had MSHA found sampling to not have been performed by their regulations it would not publish it, or would mark that results were not valid on its report. Mr. McIntosh explained he did not do any of the testing himself, nor did he know the individuals who did. He opined that the dust sampling records were representative of the Claimant's employment and did not evidence of hazardous dust exposure exceeding the permissible levels. **[Exhibit 10]**

By decision dated August 6, 2024, the BOR affirmed the CA's decision, denying the claim for OP. **[Exhibit 11]** The Claimant now appeals.

### **SUMMARY OF ARGUMENT**

The BOR's decision was clearly wrong in view of the reliable, probative

and substantial evidence of the whole record, thus, causes extreme prejudice to the substantial rights of the Claimant, and should be reversed pursuant to West Virginia Code § 23-5-12a(b).

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Petitioner submits that the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

### **ARGUMENT**

Under West Virginia Code § 23-5-12a(b), the Intermediate Court of Appeals "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."

Further, West Virginia Code § 23-4-1g requires that the resolution of the instant issue requires a weighing of all evidence pertaining to the issue and a

finding that a preponderance of the evidence supports the chosen manner of resolution. If, after weighing all 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.

The issue in this case is whether the Claimant's application for a claim of OP should have been approved.

Pursuant to W.Va. Code § 23-4-1(b), in order to file for OP benefits, the Claimant must show exposure to the hazards of OP in West Virginia over a continuous period of not less than two years during the ten years immediately preceding the date of last exposure to such hazards, or for any five of the fifteen years immediately preceding such date of last exposure. The claim must be filed within three years of the Claimant's last date of at least sixty continuous days of exposure to the hazards of OP, or within three years of being advised by a physician he has impairment due to OP. W.Va. Code § 23-4-15(b). In the case at hand, there is no dispute concerning the Claimant meeting the proper time requirements for filing his OP claim. Instead, the dispute is whether the Claimant has shown he was exposed to the hazards of OP during his employment.

A hazard of OP, as contemplated by W.Va. Code § 23-4-1(b), has been described as "any condition where it can be demonstrated that there are minute particles of dust in abnormal quantities in the work area." Fletcher v. W.Va. Office of Ins. Comm'r, No. 11-0404 (W.Va. Supreme Court, October 31, 2012)



(memorandum decision), (quoting Meadows v. Workmen's Com. Comm'r, 157 W.Va. 140, 145, 198 S.E.2d 137, 139 (1973)).

The BOR, when affirming the CA's denial of the claim, stated that Employer demonstrated the Claimant was not exposed to the hazards of dust during his employment, noting W. VA. CSR § 85-20-52.2, which provides that an employer may submit evidence demonstrating compliance with OSHA and/or MSHA permissible exposure levels that the insurance carrier may consider when finding whether or not the dust exposure satisfies the exposure requirements of W. Va. Code §§23-4-1(b) and 23-4-15(b), but only for the periods covered by the testing. **[Exhibit 11, p. 5]** To be credible, the (1) results must be based on regularly scheduled exposure samples from each work area where the harmful exposure has been alleged by Claimant; (2) the dust samples must have been obtained by a certified industrial hygienist as defined by OSHA and/or MSHA regulations or government agency; and (3) the samples must have been obtained during the period for which the employer is seeking to avoid chargeability. W. VA. CSR §85-20-52.2.

The BOR clearly erred by accepting Mr. McIntosh's opinion as credible. He testified that he had no knowledge of who actually did the testing, and so did not actually know whether the sampling was performed by a certified industrial hygienist. **[Exhibit 10]** Instead, he simply assumed that the regulations were met because it was reported on MSHA's site, and had not been marked or removed.

Further, he stated there was no way to tell whether or not the miner being sampled was actually operated by the Claimant. Mr. McIntosh simply reviewed the nine samples and found them to be under the MSHA acceptable dust limits.

Claimant testified that during his time with Employer he was exposed to coal and rock dust, especially when he was downwind of the miners cutting. He testified he was exposed to this dust on a daily basis. He testified that he had to get a respirator from a friend, and that the respirator provided to his co-worker by Employer did not have filters in it. **[See Exhibit 8]**

The BOR completely disregarded the Claimant's descriptions of his dust exposure, of the fact that there was enough dust to require him to get a working respirator from off-site, and that it was enough dust for the company to offer the workers respirators for that job. The BOR erred by giving improper weight to Mr. McIntosh's testimony, who admitted that he had no way of knowing whether the Claimant's miner was the actual one sampled, and disregard the Claimant's testimony when he testified to credible every-day experience with the dust.

Further, it is wholly unreasonable to assume that a meager nine samples is indicative of an entire year of daily dust levels, especially considering that the levels fluctuate depending on the type of work that is being done, and if it is downwind, as explained by the Claimant. **[See Exhibit 8]** To allow the assumption that only nine samples are representative of Claimant's entire year of dust exposure as an underground coal miner operator, especially when there is

no actual proof that even those nine samples were during Claimant's actual time on that specific miner, is highly prejudicial to the substantial rights of the Claimant, whose medical records provide that he has diagnosed impairment due to OP, and also has a significant work history as an underground miner.

Accordingly, the BOR decision dated August 6, 2024, should be reversed pursuant to West Virginia Code § 23-5-12a(b).

**PRAYER**

**WHEREFORE**, based upon the foregoing, the Claimant respectfully moves this Honorable Court to **REVERSE** the BOR's decision of August 6, 2024, and authorize the claim for OP.

Respectfully submitted,  
Wade Boyce  
By Counsel



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**CERTIFICATE OF SERVICE**

I, Reginald D. Henry, counsel for the Claimant herein, do hereby certify that I served the foregoing Petitioner's Brief and Appendix by forwarding a true copy thereof by File & Serve Xpress efilng, to the following:

Alysia Kozlowski, Esquire  
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September 3, 2024

A handwritten signature in cursive script that reads "Reginald D. Henry".

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