BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

ICA EFiled: Oct 03 2024
05:01PM EDT
Transaction ID 74668317

WADE BOYCE,

Petitioner,

v.

CARRIER NO. 2023008188
JCN: 2023018621
CASE NO. 24-ICA-346

QUINWOOD COAL COMPANY LLC

Respondent,

BRIEF ON BEHALF OF

QUINWOOD COAL COMPANY LLC

Alysia Kozlowski, Esquire
(W. Va. State Bar No. 13177)
Post Office Box 3922
400 Quarrier Street
Charleston, WV 25339
(304) 941-1022

TABLE OF CONTENTS

TABLE OF AUTHORITIES……..…iii

I. INTRODUCTION…….…..1

II. STATEMENT OF THE CASE.……..2

III. SUMMARY OF ARGUMENT.……...5

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION…….5

V. ARGUMENT…….....5

VI. CONCLUSION…….…….....10

TABLE OF AUTHORITIES

Barnette v. State Workers' Comp. Comm'r., 44 S.E.2d 305 (W.Va. 1947)……7

Estep v. State Compensation Comm'r, 44 S.E.2d 305, 306 (W. Va. 1947)……7

Fletcher v. West Virginia Office of Insurance Commissioner, 2012 W.Va. LEXIS 803……6

Gibson v. State Compensation Comm'r, 31 S.E.2d 555, 557 (W. Va. 1944)……..7

Martin v. Randolph County Bd. of Educ., 465 S.E.2d 399 (W.Va. 1995)…….10

Meadows v. State Workmen's Compensation Comm'r, 198 S.E.2d 137 (1973)…….6

Smith v. State Workers' Comp. Comm'r., 189 S.E.2d 838 (W. Va. 1972)…….....7

W.Va. Code § 23-4-1(b)……..5, 6

W.Va. Code § 23-4-14(a)(1)……5

W.Va. Code §23-4-15(b)…….5, 6

W. Va. Code §23-5-12a……...6

W.Va. C.S.R. §85-20-52.2……..7, 8

30 CFR §71.100…..……..7

30 CFR §71.202(a),(b)…….……8

30 CFR §71.206…….……..8

BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

WADE BOYCE,

Petitioner,

v.

CARRIER NO. 2023008188
JCN: 2023018621
CASE NO. 24-ICA-346

QUINWOOD COAL COMPANY LLC

Respondent,

BRIEF ON BEHALF OF
QUINWOOD COAL COMPANY LLC

I. INTRODUCTION

This claim comes before the Workers' Compensation Board of Review on an appeal by Claimant-Petitioner. Claimant seeks an order reversing the Decision of the Board of Review ("BOR") dated August 6, 2024, which affirmed the Claims Administrator's Order of May 9, 2024, denying the claim for occupational pneumoconiosis. Claimant argues that the final order of the BOR should be reversed, and his claim held compensable.

Quinwood Coal Company LLC ("Quinwood") responds herein to Claimant's appeal and asserts the BOR's decision is not clearly wrong. As demonstrated by the evidence on record, Claimant was not exposed to hazardous dust in the course of his employment with Quinwood. Therefore, the decision of the BOR should now be affirmed by this Honorable Board.

II. STATEMENT OF THE CASE

On or about March 27, 2023, Claimant filed an application for occupational pneumoconiosis benefits. Claimant reported he began working for Quinwood in 2021 and it currently still employed by Quinwood. (Claimant's Exhibit 1).

By order dated May 9, 2023, the Claim Administrator issued a decision denying the claim for occupational pneumoconiosis benefits on the basis that Claimant was not exposed to hazardous levels of dust in the course of his employment with Quinwood based on dust sampling records submitted with the employer's report of OP. Claimant protested this decision. (Claimant's Exhibit 7).

Claimant's deposition was taken on October 4, 2023. Claimant testified that he began working for Quinwood as a miner operator on March 31, 2022. Claimant stated he worked in that position for approximately one year, then began working as a section foreman until he was laid off on September 1, 2023. As a miner operator, Claimant testified that he was required to wear a personal dust monitor once a quarter at the start of every quarter through the Mine Safety and Health Administration ("MSHA") and they were required to run 15 samples for the day and evening shift in accordance with MSHA requirements. Claimant testified that he was not required to wear a dust monitor once he became a section foreman because the miner operators and bolt men are listed as the designated operations by MSHA regulations. However, Claimant stated he was responsible for ensuring the members of his crew were wearing the monitors as appropriate and he was required to check the monitors twice per shift. Claimant further confirmed that the dust sampling at Quinwood was conducted in accordance with MSHA requirements and at no time while he was working at Quinwood received a notice that he had been exposed to dust beyond the permissible limits set by MSHA. (Claimant's Exhibit 8).

In response to claimant's protest, the employer submitted the March 13, 2024 report of James McIntosh, Certified Industrial Hygienist. Mr. McIntosh reviewed dust sampling from the period of December 14, 2022 through July 13, 2023, which were provided by Quinwood and obtained from MSHA and available on the MSHA web site. Mr. McIntosh found that the air samples were collected conforming to MSHA regulations. The dust samples collected during the time of claimant's employment and his alleged exposure were well below MSHA's respirable dust standard of 1.5 mg/m3. (Claimant's Exhibit 9).

Mr. McIntosh was deposed on May 5, 2024. Mr. McIntosh stated that he is a professor and chair of mechanical engineering at Marshall University, and also has a consulting business, McIntosh Consultants. He confirmed he has worked as a certified industrial hygienist since 1991. Mr. McIntosh explained that in his capacity with McIntosh Consultants, he has performed various industrial hygiene safety work, including training, auditing facilities, development of industrial hygiene programs, and air sampling strategies. He stated he has exclusively worked on litigation support issues for the past two years. (Claimant's Exhibit 10).

With respect to his review of the present case, Mr. McIntosh stated he used the mine data air sampling retrieval system and MSHA's collection of dust samples for Quinwood during Claimant's employment. He explained that he used the job code from the data retrieval system that corresponded to the miner operator classification to identify which samples would be representative of Claimant's employment. In making his determination that Claimant was not exposed to hazardous levels of dust during his employment at Quinwood, Mr. McIntosh explained that as an industrial hygienist, "hazardous" is defined based on the permissible exposure levels. Mr. McIntosh testified that MSHA is the regulatory agency responsible for oversight of coal mine operators and enforcing compliance with respirable dust standards under Federal Regulations 30

CFR Part 70, 71, and 90. Mr. McIntosh further confirmed that under 30 CFR Part 70, the respirable dust standard for underground coal miners is 1.5 milligrams per cubic foot.

Mr. McIntosh testified that federal regulations provide that individuals can complete an MSHA course and examination to become certified in performing dust sampling for underground coal mines, even if the individual is not a certified industrial hygienist. Mr. McIntosh further explained that the dust sampling conducted by MSHA is performed by individuals certified to do so under the requirements of 30 CFR Part 70. Mr. McIntosh testified that the MSHA dust samples are made publicly available, and if the samples are invalid or unreliable in any way, MSHA will either not publicly report the samples, or the samples will be publicly voided. In this case, he confirmed there was no indication that the samples for Quinwood were either invalid or unreliable.

Mr. McIntosh stated that federal regulations do not require every underground miner to be sampled. Instead, the regulations require representative sampling of designated job classes. Mr. McIntosh testified that he believes the MSHA dust sampling records he reviewed for this case were valid and representative of Claimant's employment with Quinwood. Moreover, Mr. McIntosh confirmed that the MSHA dust sampling is conducted independent of any sampling performed by Quinwood and is not influenced by Quinwood in any manner. Mr. McIntosh further confirmed that he did not find any record to suggest that Quinwood had ever been cited by MSHA for exceeding the respirable dust standard at any point during Claimant's employment. Mr. McIntosh testified that in his opinion, as a certified industrial hygienist and to a reasonable degree of certainty, MSHA dust samples for Quinwood are representative of Claimant's employment and do not show evidence of a hazardous dust exposure.

By Order dated August 6, 2024, the BOR affirmed the May 9, 2024 order of the Claim Administrator denying claim for occupational pneumoconiosis benefits. The Administrative Law Judge found that it was more likely than not that Claimant was not exposed to the hazards of occupational pneumoconiosis during his employment with Quinwood. It is from this Order Claimant brings this appeal. (Claimant's Exhibit 11).

III. SUMMARY OF ARGUMENT

The reliable evidence of record demonstrates that Claimant was not exposed to abnormal or hazardous dust while employed at Quinwood. Under West Virginia law, if an employer submits credible evidence demonstrating that it has been in compliance with OSHA and/or MSHA permissible exposure levels, as determined by sampling and testing performed in compliance with OSHA and/or MSHA regulations for the dust alleged by the injured worker, then the carrier may consider that the dust exposure alleged by the injured worker does not suffice to satisfy the exposure requirements of WV Code §23-4-1(b) and 23-4-15(b). Here, the employer submitted credible dust sampling records covering the period of Claimant's employment with Quinwood. Those records were reviewed by a certified industrial hygienist, James McIntosh, who determined that the dust samples were valid and representative of Claimant's employment at Quinwood and did not show evidence of a hazardous dust exposure beyond permissible limits. Therefore, Claimant has failed to satisfy the exposure requirements under West Virginia law.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent does not request oral argument.

V. ARGUMENT

THE ADMINISTRATIVE LAW JUDGE WAS NOT CLEARLY WRONG TO AFFIRM THE CLAIM ADMINISTRATOR'S ORDER BECAUSE THE MEDICAL EVIDENCE OF RECORD ESTABLISHES THAT CLAIMANT WAS NOT EXPOSED TO HAZARDS OF OCCUPATIONAL PNEUMOCONIOSIS DURING HIS EMPLOYMENT.

In cases involving occupational pneumoconiosis, the date of injury shall be the date of last exposure to the hazards of occupational pneumoconiosis. W.Va. Code § 23-4-14(a)(1). In order to be eligible for benefits related to occupational pneumoconiosis, a claimant must have been exposed to the "hazards of occupational pneumoconiosis." W.Va. Code § 23-4-1(b); *Fletcher v. West Virginia Office of Insurance Commissioner*, 2012 W.Va. LEXIS 803. A "hazard" consists as any condition where it can be demonstrated that there are abnormal quantities of dust in the work area. *Meadows v. Workmen's Compensation Commissioner*, 198 S.E. 2d 137 (W.Va. 1973).

Pursuant to West Virginia Code § 23-4-1(b), compensation shall not be payable for the disease of occupational pneumoconiosis, or death resulting from the disease, unless the employee has been exposed to the hazards of occupational pneumoconiosis in the State of West Virginia over a continuous period of not less than two years during the ten years immediately preceding the date of his or her last exposure to such hazards, or for any five of the fifteen years immediately preceding the date of his or her last exposure. To be entitled to compensation for the disease of occupational pneumoconiosis, the employee must have been exposed to the hazards of occupational pneumoconiosis for a continuous period of not less than sixty days within three years prior to filing his or her claim. W.Va. Code §23-4-15(b).

Moreover, according to W. Va. Code § 23-5-12a, if a decision of the BOR is appealed, the Intermediate Court shall reverse the findings only when the BOR's findings are (1) in violation of statutory provisions; (2) in excess of statutory authority or jurisdiction; (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. The West Virginia Supreme Court of Appeals has held that a decision is clearly wrong if it is not supported by the evidence of

record, if it is clearly against the preponderance of the evidence, or if it is based upon evidence which is speculative and inadequate. *Gibson v. State Compensation Comm'r*, 31 S.E.2d 555, 557 (W. Va. 1944); *Estep v. State Compensation Comm'r*, 44 S.E.2d 305, 306 (W. Va. 1947); *Barnette v. State Workers' Comp. Comm'r*., 44 S.E.2d 305 (W.Va. 1947); *Smith v. State Workers' Comp. Comm'r.*, 189 S.E.2d 838 (W. Va. 1972).

W.Va. C.S.R. §85-20-52.2, holds that if the employer submits credible evidence demonstrating that it has been in compliance with OSHA and/or MSHA permissible exposure levels, as determined by sampling and testing performed in compliance with OSHA and/or MSHA regulations for the dust alleged by the injured worker, then the Commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, may consider that the dust exposure alleged by the injured worker does not suffice to satisfy the exposure requirements of WV Code §23-4-1(b) and 23-4-15(b) only for the period(s) covered by the sampling or testing. In order for the evidence to be deemed credible, it must be based upon regularly scheduled exposure samples from each work area where harmful exposure has been alleged, which samples will be obtained by certified industrial hygienists as defined by OSHA and/or MSHA regulations or government agencies, and the samplings must be obtained during the period for which the employer is seeking to avoid chargeability.

West Virginia law does not provide a quantifiable definition for "abnormal quantities of dust" in the workplace. In the absence of such guidance, the Board must look toward outside sources. Pursuant to 30 CFR § 71.100, the respirable dust standard for all coal mine operators is 1.5 mg/m3. The respirable dust sampling performed under 30 CFR Part 70 requires that all sampling be performed by a certified person, who has completed the applicable MSHA course of

instruction and examination. 30 CFR § 71.202(a),(b). One valid representative sample must be obtained for each quarterly period for designated work positions. 30 CFR § 71.206.

According to W.Va. C.S.R. §85-20-52.2, for dust sampling to be deemed credible, "it must be based upon regularly scheduled exposure samples from each work area where harmful exposure has been alleged, which samples will be obtained by certified industrial hygienists *as defined by OSHA and/or MSHA regulations or government agencies* [emphasis added]. . ." As noted above, federal regulations do not require that sampling be conducted by certified industrial hygienist. The regulations require only that the sampling be performed by "certified persons," meaning individuals who have completed the MSHA course and examination for dust sampling. Mr. McIntosh confirmed that the testing conducted by MSHA is performed by certified individuals under federal regulations.

Moreover, the dust samples in this case were reviewed by certified industrial hygienist, Mr. McIntosh, who confirmed that the samples were representative and conducted in accordance with MSHA standards. In fact, Claimant himself confirmed that the testing conducted at Quinwood was performed in accordance with MSHA regulations and as a section foreman, he was responsible checking the dust monitors twice per shift and ensuring that his crew members wore their dust monitors appropriately. Based on Mr. McIntosh's review of the valid and representative samples, there were no samples above the permissible exposure limit. Claimant also confirmed that he had never been advised by MSHA that he had a dust exposure over permissible exposure limits while working at Quinwood.

Claimant argues that the dust samples reviewed by Mr. McIntosh are not valid because "there is no way to tell whether or not the miner being sampled was actually operated by claimant." However, federal regulations do not require that every underground miner be sampled for dust

exposure. Instead, federal regulations require representative sampling for designated work positions that are at the highest risk of an exposure. In this case, Mr. McIntosh reviewed the sampling for the miner operator job classification during Claimant's employment with Quinwood and found no evidence of an exposure beyond permissible limits. This is consistent with Claimant's own testimony confirming that he had never been advised of a dust exposure beyond permissible limits during his employment at Quinwood.

Claimant also argues it is unreasonable to determine whether Claimant's exposure was harmful based on "a meager nine samples." Once again, federal regulations do not require that sampling be performed on a daily, weekly, or even monthly basis. Instead, as Claimant described in his testimony and as confirmed by Mr. McIntosh, MSHA requires that designated job classifications be sampled on a quarterly basis. Rule 20 requires only that samples be "regularly scheduled." There is simply no basis to state that the samples reviewed by Mr. McIntosh are invalid or unrepresentative when the samples were conducted in accordance with federal regulations and in compliance with the requirements of Rule 20. Claimant's only evidence in this claim is his deposition testimony in which he describes how he was exposed to dust in his employment. However, the question is not whether Claimant was exposed to dust. The proper question is whether Claimant was exposed to abnormal quantities of dust at Quinwood, and the reliable dust sampling records definitively show that there was no abnormal or hazardous exposure during his employment.

The BOR's ruling is supported by the evidence and is also consistent with the applicable law. The West Virginia Supreme Court has long held that deference must be given to the credibility determinations and inferences made by a hearing examiner/administrative law judge even if the appeals court believes that there are different, more reasonable conclusions that can be drawn from

the evidence. *Martin v. Randolph County Bd. of Educ.,* 465 S.E.2d 399 (W.Va. 1995). The evidence of record demonstrates that Claimant was not exposed to hazardous dust during his employment with Quinwood from May 31, 2022 through September 1, 2023 per the report and opinion of Mr. McIntosh based on credible and representative dust sampling records.

VI. CONCLUSION

For all the foregoing reasons, the Employer respectfully requests that the Intermediate Court of Appeals affirm the BOR's of August 6, 2024, denying the claim for occupational pneumoconiosis.

Respectfully submitted,
Quinwood Coal Company LLC
By Counsel

Alysia Kozlowski, Esquire
(W. Va. State Bar No. 13177)
Post Office Box 3922
400 Quarrier Street
Charleston, WV 25339-3922
(304) 941-1022

BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

WADE BOYCE,

Petitioner,

v.

CARRIER NO. 2023008188
JCN: 2023018621
APPEAL NO. 24-ICA-346

QUINWOOD COAL COMPANY LLC,

Respondent,

CERTIFICATE OF SERVICE

I, Alysia Kozlowski, attorney for Quinwood Coal Company LLC, do hereby certify that a true and exact copy of the foregoing **"BRIEF ON BEHALF QUINWOOD COAL COMPANY LLC."** was served upon all parties of record via File & ServeXpress, this 3rd day of October, 2024, addressed as follows.

Reginald Henry, Esquire
PO Box 465
Mabscott, WV 25871

Alysia Kozlowski

Alysia Kozlowski, Esquire
(W. Va. State Bar No. 13177)
Post Office Box 3922
Charleston, WV 25339
(304) 941-1022