

BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

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CHRISTOPHER SARGENT,

Petitioner,

v.

CARRIER NO. 2023020395

JCN: 2024003153

CASE NO. 24-ICA-440

ALPHA METALLURGICAL RESOURCES INC.,

Respondent,

RESPONDENT'S BRIEF

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**BRIEF ON BEHALF OF
ALPHA METALLURGICAL RESOURCES INC.**

I. INTRODUCTION

This claim comes before the West Virginia Intermediate Court of Appeals on an appeal by Claimant-Petitioner. Claimant seeks an order reversing the Decision of the Board of Review (“BOR”) dated October 7, 2024, which denied the claim for occupational pneumoconiosis (“OP”). The claim was denied on the basis that evidence submitted by Claimant does not satisfy the exposure requirements of W.Va. Code 23-4-15(b).

Alpha Metallurgical Resources Inc. (“Employer”) 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 the hazards of OP during his employment with Alpha. Therefore, the Decision of the BOR should now be affirmed by this Honorable Court.

II. STATEMENT OF THE CASE

Claimant filed a claim for occupational pneumoconiosis (“OP”) benefits on or about June 20, 2023. (Claimant’s Exhibit 1). At the time of application, Claimant was still employed by Alpha Natural

Resources (“Alpha”). In his application, Claimant reported he last worked as a continuous miner operator for Alpha from September 2021 to the present. By order dated August 30, 2023, the claim was rejected on the basis that the evidence that Claimant submitted does not satisfy exposure requirements under W.Va. Code §23-4-15b. (Claimant’s Exhibit 5).

Claimant’s deposition was taken on March 21, 2024. (Claimant’s Exhibit 7). Claimant testified that the dust sampling performed by Alpha was performed in compliance with MSHA regulations and he had never received a notice indicating that he had been exposed to dust beyond permissible exposure levels. Claimant also testified that he was provided breathing protection while working at Alpha and that “Alpha is probably one of the best [employers] for the least dust.”

On August 8, 2024 the employer submitted the report of James McIntosh, Certified Industrial Hygienist, as well as dust sampling results submitted by Alpha. (Claimant’s Exhibits 8 & 9). Mr. McIntosh reviewed dust sampling results from August 23, 2021 to May 25, 2022, as well as sampling performed from August 1, 2022 to July 10, 2023. Mr. McIntosh determined that the dust samples conformed to federal regulations and were valid and representative of Claimant’s dust exposure during his employment with Alpha. Of the approximately 131 samples reviewed, there were no exposures beyond the permissible limits established by MSHA. In his professional opinion, Mr. McIntosh determined Claimant did not have exposure to hazardous levels of airborne dust during his employment at Alpha.

On October 7, 2024, the BOR affirmed the order denying the claim. (Claimant’s Exhibit 10). The Board found that Mr. McIntosh’s report establishes that the requirements of W.Va. C.S.R. § 85-20-52.2 have been met.

III. SUMMARY OF ARGUMENT

The reliable evidence of record demonstrates that Claimant was not exposed to abnormal or hazardous dust while employed at Alpha. 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. 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 Alpha 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

Respondent does not request oral argument.

V. ARGUMENT

THE BOARD OF REVIEW WAS NOT CLEARLY WRONG TO AFFIRM THE CLAIM ADMINISTRATOR'S ORDER DENYING BENEFITS BECAUSE THE RELIABLE EVIDENCE OF RECORD ESTABLISHES THAT CLAIMANT WAS NOT EXPOSED TO THE 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). 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. 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 Court 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 §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] . . .” 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 dust sampling performed and provided by Alpha conformed to federal regulations.

Mr. McIntosh also confirmed the dust samples were valid and representative of Claimant’s employment at Alpha. Based on his review, Mr. McIntosh confirmed none of the samples were above

the permissible exposure limit. Mr. McIntosh's opinion is validated through Claimant's own testimony in which he confirmed that he had never been advised by MSHA that he had dust exposure beyond permissible exposure limits while working at Alpha. In fact, Claimant stated that "Alpha is probably one of the best for the least dust" when asked about his dust exposure. Claimant noted that Alpha runs a scrubber system and keeps their roads wet which reduced the dust exposure.

Claimant argues that the dust samples submitted by Alpha are invalid because Claimant is not MSHA certified to collect dust samples. However, this argument demonstrates a misunderstanding of the testimony and state and federal regulations regarding dust sampling. Alpha does not contend that Claimant himself collected the dust samples, nor did Claimant testify that he collected the samples. Claimant confirmed that he wore a dust monitor as required when he worked in a designated work position, as determined by MSHA. Claimant testified that the sampling was collected by the safety team at Alpha, and as confirmed by Mr. McIntosh, the samples and procedures conformed to federal requirements. The fact that Claimant himself is not MSHA certified to collect dust samples has no bearing on the validity of the testing.

Claimant also argues that Mr. McIntosh's report only spoke about federal regulations and did not consider the requirements of Rule 20. However, Rule 20 specifically defers to federal requirements regarding dust sampling. Under §85-20-52.2, "[i]f the employer submits credit 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 . . . " [emphasis added]. It goes on to state that samples must be based upon regularly scheduled exposure samples which samples will be obtained by certified industrial hygienists "**as defined by OSH and/or MSHA regulations or government agencies . . .**" [emphasis added]. As noted above, federal regulations do not require that a certified industrial hygienist obtain dust samples, nor do they require that every miner be sampled or that sampling be conducted on a daily basis. Instead, federal regulations require 15 valid and representative samples each calendar

quarter for designated work positions that are at the highest risk of exposure. Mr. McIntosh, as a certified industrial hygienist, reviewed the dust samples and confirmed that the samples collected complied with federal regulations and were within permissible exposure limits. Therefore, 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 Alpha, 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 demonstrates that Claimant was not exposed to hazardous dust during his employment with Alpha per the report and opinion of Mr. McIntosh based on credible and representative dust sampling records. Therefore, the BOR's ruling should be affirmed by this Honorable Court.

VI. CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court affirm the BOR's decision of October 7, 2024, denying claim for occupational pneumoconiosis benefits.

Respectfully submitted,
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By Counsel

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Dated: December 5, 2024

BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

Christopher Sargent,

Appellant,

v.

CARRIER NO. 2023023095

JCN: 2024003153

CASE NO. 24-ICA-440

CORONADO GROUP LLC

Appellee,

CERTIFICATE OF SERVICE

I, Alysia Kozlowski, attorney for Alpha Metallurgical Resources Inc., do hereby certify that a true and exact copy of the foregoing **“BRIEF ON BEHALF OF ALPHA METALLURGICAL RESOURCES INC.”** was served upon all parties of record by File & Serve Xpress e-filing on the 5th day of December 2024, to the following

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