

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

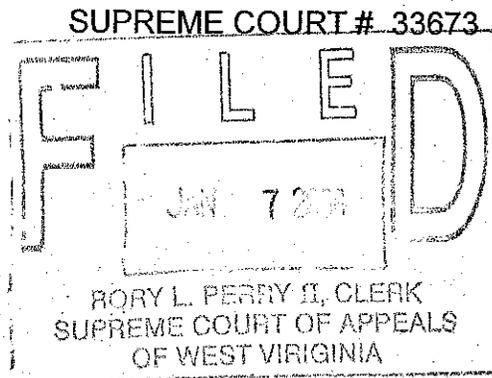
JACK L. GARRISON

Appellee,

vs.

FENTON ART GLASS COMPANY

Appellant.



**BRIEF ON BEHALF OF APPELLEE
JACK L. GARRISON**

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CHARLESTON, WEST VIRGINIA 25337

January 7, 2008

RESPONSE BRIEF

STATEMENT OF THE CASE

The record in this case amply demonstrates that both the Administrative Law Judge and the Workers' Compensation Board of Review properly concluded that the employer had not met its burden of proof as it relates to the non-medical order entered by the Claims Administrator's order dated February 16, 1998, and to the 5% permanent partial disability award dated May 30, 2006, for the x-ray diagnosis of occupational pneumoconiosis.

The appellant, in its brief, does not accurately reflect the testimony of the Occupational Pneumoconiosis Board as it related to the FRAGA hearing held on May 21, 2003. When one reads the transcript of that hearing, it is clear that all three members of the Occupational Pneumoconiosis Board believed the two dust studies conducted by Dr. Stobie in November, 1998, and March, 1999, were not sufficient to find that the appellee was not exposed to hazardous dust during his employment at Fenton Art Glass Company. The employer based its argument that these two studies conducted by Dr. Stobie, its bought and paid for expert, with the employer having full knowledge that he was going to conduct studies on those two days were an accurate representative of the exposure of airborne dust by Mr. Garrison during his work career at Fenton Art Glass Company.

Mr. Garrison began working at Fenton Art Glass in August, 1968, at least thirty years prior to Dr. Stobie's first test in November, 1998. The employer also makes mention of other studies done on its behalf in the 1970's prior to Dr. Stobie's testing. However, Dr. Stobie, in his deposition, testified that he would not rely upon those studies in forming his opinions. Furthermore, the Occupational Pneumoconiosis Board did not have the 1970's studies to review, nor were they introduced into this record by the appellant. As such, the appellant cannot now argue that they should be considered in this case.

With respect to the appellant's other expert, Dr. McGraw, he spent approximately three hours walking through the plant at the expense of the employer. Dr. McGraw conducted no independent testing. The Occupational Pneumoconiosis Board did not place any credence in his report. With respect to his report, Dr. Walker, the Occupational Pneumoconiosis Board's Chairman, was asked the following:

- Q. Do you find his opinions unreliable based upon his walk through?
- A. I felt that he drew conclusions that I cannot agree with.
- Q. Do you find his opinions unreliable in this case?
- A. I could not agree with his conclusions at all.

Furthermore, Dr. Walker in summing up his opinions in this case, was asked the following:

- Q. In summary, doctor, you cannot testify today that these gentlemen were not exposed to harmful dust when they were employed there; correct?
- A. On the base of the present record that is my opinion.

Dr. Kinder, also agreed with the testimony of Dr. Walker. Dr. Hayes, the Board's radiologist, also agreed with Dr. Walker and also testified that the opinions by Dr. McGraw did not have any rational basis to be made, and that he was unable to state that these gentlemen, prior to Dr. Stobie's first testing, were not exposed to hazardous dust.

The appellant now asks this Court to deny the appellee's claim, by ruling that they can present testing from their own expert on two separate days and have this Honorable Court hold that these two tests were representative of over forty years of dust exposure that this appellee had at its facility. Neither the Workers' Compensation Office of Judges or the Board of Review accepted this argument and neither should this Court.

The appellant next asks this Court to reverse the 5% permanent partial disability award granted to the appellee for the x-ray diagnosis of occupational pneumoconiosis,

by the Workers' Compensation Board of Review ruling dated May 30, 2006. The Board of Review was clearly within its statutory authority in reversing the ruling of the Administrative Law Judge in this case. As stated by the appellant in its brief, the appellee submitted the reports of Drs. Aycoth, Gaziano and Dr. Bassali, all who have indicated that Mr. Garrison suffered from occupational pneumoconiosis. Drs. Aycoth, Gaziano and Bassali are all certified NIOSH B Readers. It is universally accepted amongst radiologists that x-rays are subject to reader variability which means they can be interpreted differently by the physicians who read them. It is very easy for the appellant in this case to state that all of their physicians concur on the diagnosis since they all read the x-rays negative. While there may be minor differences between the appellee's expert's B Readings, all the radiologists made the diagnosis of occupational pneumoconiosis. Given the reader variability involved in the interpretation of the x-rays, there is some variance of the opinions expressed by the appellee's doctors. Pursuant to W.Va. Code §23-4-1g, the Board of Review correctly weighed the evidence in favor of the appellee.

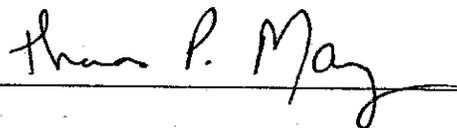
CONCLUSION

For the foregoing reason, the appellee respectfully request that that this Honorable Court affirm the ruling of the Workers' Compensation Board of Review.

Respectfully yours,

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By _____



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January 7, 2008

CERTIFICATE OF SERVICE

I, Thomas P. Maroney, counsel for Appellee herein, do hereby certify that I served the foregoing Appellee's Brief upon the following by hand delivery and/or by mailing a true and accurate copy of the same via the United States Postal Service, postage prepaid, on this the 7th day of January, 2008.

HAND DELIVERY:

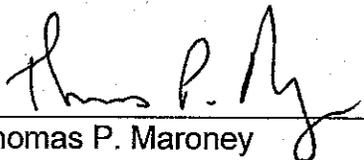
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