

BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

No. 23 - _____

ICA EFiled: Oct 11 2023
04:46PM EDT
Transaction ID 71062319

**HAROLD R. MURPHY (DECEASED)
LINDA MURPHY, WIDOW**

PETITIONER,

V.

**SAINT GOBAIN CERAMICS & PLASTICS,
EMPLOYER,
AND WEST VIRGINIA OFFICES OF THE
INSURANCE COMMISSIONER – OLD FUND**

RESPONDENT,

BRIEF IN SUPPORT OF APPEAL

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ASSIGNMENTS OF ERROR

The Board of Review erred in finding that the Petitioner had not met her burden of proof to show that her husband suffered death caused by an occupational disease, where she offered evidence of exposure and a supporting expert opinion of the link between exposure to asbestos fibers under *Bradford v. Workers' Compensation Comm'r*, Syl. Pt. 3, 185 W.Va. 434, 408 S.E.2d 13 (1991).

Whether the Board of Review committed error by adopting the findings of the Occupational Pneumoconiosis Board when it relied on out-of-date studies, as set forth in the Petitioner's experts' report and affidavit, admitted the Petitioner had evidence of occupational exposure to asbestos and was speculative in its diagnosis of non-occupational diseases. *Bradford v. Workers' Compensation Comm'r*, Syl. Pt. 3, 185 W.Va. 434, 408 S.E.2d 13 (1991).

The Board of Review erred in failing to properly apply the holding in *Powell v. State Workmen's Compensation Commissioner*, 166 W.Va. 327, 273 S.E.2d 832 (1980) that W.Va. Code § 23-4-1 does not require the claimant to prove the conditions of his or her employment were the exclusive or sole cause of the disease nor does it require the claimant to show that the disease is peculiar to one industry, work environment, or occupation.

STATEMENT OF THE CASE

This is the appeal from an adverse decision of the Worker's Compensation Board of Review Entered September 10, 2023, affirming the order of the Third-Party Administrator denying the widow lifetime benefits. As set forth below in more detail, the Petitioner's decedent was employed by a refractory brick manufacturer in Buckhanan, West Virginia. He suffered a respiratory death.

The issue is whether the fibrosis was caused or contributed to in any material degree by his exposure to asbestos and silica. The Petitioner relies on tissue digestion studies which showed the presence of commercial asbestos fibers in the tissue. The Board testified that despite agreeing that the Decedent had such exposure, his disease was idiopathic, having no diagnosable cause, and therefore was not related to his exposure. The Petitioner contends that first the Board failed to rebut the presumption of causation based on its failure to state a specific cause of his disease, and further erred in adopting the Employer's expert report. The issue regarding asbestos fiber burden turns on the passage of time; certain fibers have a half-life in lung tissue such that, after the passage of decades after exposure, as here, the count of fibers in tissue is significantly less than it would have been at the time exposure ceased.

STATEMENT OF FACTS

The Petitioner filed a claim for widow's and dependent's benefits stating that the Petitioner's decedent suffered from fibrotic lung disease cancer caused or contributed to in any material degree by exposure to respirable asbestos fibers and silica in the course of his employment. The date of death was January 5, 2020. The cause of death on the death certificate is listed as respiratory failure, chronic obstructive pulmonary disease, occupational lung disorder. Appendix 000517 – 000518.

The Petitioner submitted evidence that Decedent was employed at Corhart Refractories/St. Gobain in Buchanan, West Virginia. Appendix 000022 – 000041. The Petitioner received a non-medical order finding that the Petitioner met the requirements for a presumptive claim.¹ Appendix 000001 – 000003.

¹ The Order states:

- The last day of the last 60 continuous days when the deceased employee may have been exposed to the hazards of occupational pneumoconiosis was July 31, 1998;
- For the purposes of this workers' compensation claim only, the employee has satisfied the

The claim was referred to the Occupational Pneumoconiosis Board and by Order dated May 20, 2021, the claim was denied on the basis that “occupational pneumoconiosis did not cause nor was a material contributing factor in the employee's death.” The Order was duly protested on May 25, 2021. Appendix 000582 – 000586.

On September 29, 2021, the Petitioner submitted 19 items in support of her protest. The evidence submitted included material safety data sheets (Appendix 000042 – 000053, 000054 – 000058, 000059 – 000070, 000074 – 000078, 000079 – 000088, 000089 – 000095, 000099 – 000106, 000107 -000111, 000173 – 000186, 000187 – 000198, 000199 – 000203), CT scans (Appendix 000071 – 000073), the Application for Fatal Dependents’ Benefits (Appendix 000022 – 000041), Anatomic Pathology Report (Appendix 000260 – 000267), treatment records (Appendix 000004 – 000021), complaint summary form (Appendix), job description (Appendix 000096 – 000098), Answers to Old Fund Interrogatories (Appendix 000152 – 000172).

The Petitioner submitted the report of Robert Gordon, PhD and Curriculum Vitae on April 7, 2022. Appendix 000257 – 000259, 000214 – 000256. On February 13, 2023, the Petitioner submitted the affidavit of Dr. Gordon in rebuttal to the evidence offered by the Old Fund. Appendix 000537 - 000546.

The exposure in this case is the following.² The work site manufactured two lines of products, asbestos clad refractory brick and silica based “glass” block. As set forth in the report of

requirement of exposure of 2 continuous years during the 10 years immediately preceding his/her date of filing or last exposure or for any 5 years during the 15 years immediately preceding the date of filing or date of last exposure. as set forth in West Virginia Code 23-4-1 (b);

• Presumptive: That for the purposes of this workers' compensation claim only, the employer agrees that the employee has satisfied the requirement of 10 years of exposure during the 15 years immediately preceding his/her date of filing or date of last exposure and that this claim is to be considered under the statutory presumption set forth in West Virginia Code 23-4-8c(b). Appendix 000002.

² The description from the employer’s report describes the exposure as follows: “Employment History: Mr. Murphy filed an application for Worker's Compensation in July 1998 in which he contended that he had developed occupational pneumoconiosis areas as a result of work exposure over a number of years. The claimant worked for

the Employer, the workplace ceased the manufacture of asbestos clad brick in the early 1980's. It is important to note that the exposure to asbestos here ceased many years before the death of the Petitioner's decedent. The issue before the Board, as set forth in more detail below, is the effect of the passage of time on the presence of asbestos fibers in lung tissue, as opposed to the resulting scarring. The position of the Petitioner's expert is that chrysotile, having a half-life, will over time be digested by the lung, leaving behind fibrosis. The consequence of this is that the Board relied on studies from 1992 which were not based on individuals with the exposure history of the Petitioner's decedent. The Board committed an error by relying on studies from decades ago, rather than the updated and current information from Dr. Gordon.

The report of Dr. Gordon states,

It is my opinion with a reasonable degree of scientific certainty that Mr. Murphy had mixed occupational asbestos exposure which is documented by his fiber burden of chrysotile and amphibole asbestos, crocidolite, amosite and tremolite. Based on my finding of significant amounts of commercial asbestos at occupational levels and types of asbestos fiber burden substantiates and attributes, the asbestos was a causative factor for Mr. Murphy's severe asbestosis with honeycombing and pleural plaques. It was this severe asbestosis that caused his

Corning glassworks from February 16, 1969 to June 1, 1985. Subsequently he was employed at Corhart Refractories from June 1, 1985 to on or about July 28, 1998. Both Corning and Corhart designed and manufactured materials used blast furnace construction.

Mr. Murphy's job description at Corhart included operating finishing machinery and equipment including surface grinders, lathes, drill presses, saws and hand grinders. He would hand chip or hand grind refractory shapes before machining. He would assemble finished castings of an installation to ensure proper fit. He would be required to saw, block or shape to the nearest dimension and core drill to enlarge the opening. He would grind and finish various components, working with hard ceramics including zircon, alumina and chrome oxide. He would perform maintenance on various machines, cleaning and oiling them as required. He would transport various types of materials from different locations using a forklift. He was also required to separate rejected ware from quality ware and stack or palletize fired ware in a safe and orderly manner.

Dust Exposure History: Corning Glassworks was purchased and began operating under the auspices of Corhart Refractories in June 1985. By letter to the Office of Judges dated January 6, 1999 Corhart submitted the results of numerous dust level samplings. These dust samplings, beginning as early as August 1983, were performed by employees of Corning Glass and Corhart Refractories and by outside consultants hired to validate the employer's data and results. The data demonstrated that dust levels at the facility rarely exceeded levels deemed hazardous and reflected no continuous levels of exposure sufficient to cause occupational disease under standards established by the American Congress of Governmental and Industrial Hygienists and by the National Institute for Safety and Health, as implemented by the Occupational Safety and Health Administration. Sampling and safety programs were instituted by Corning Glass and continued after the facility was purchased by Corhart.

The use of asbestos in the plant was terminated in the early 1980s; asbestos was not used in the facility when operated by Corhart. Appendix 000400 – 000443.

right heart to enlarge and develop right heart failure. In addition, silica particles were evident in an amount that demonstrates occupational exposure to silica. Appendix 000257 – 000259.

The Employer submitted a report that the Petitioner's Decedent did not have an asbestos related disease. Appendix 000400 – 000443.

The Petitioner submitted an affidavit from Dr. Gordon which rebutted the opinions of the Employers' expert.³ Dr. Gordon first summarized his response:

3. As set forth below, my response to the report by Dr. Swedarsky focuses on the following points:

I found the presence of crocidolite and amosite fibers, which means Mr. Murphy had an occupational exposure to these commercial fibers.

I found levels of fibers other than chrysotile that demonstrate occupational exposures, particularly since almost 40 years have elapsed since the facility stopped using asbestos board in the manufacture of refractory block and phased out the use asbestos containing materials.

It is well established that chrysotile has a half-life shorter than other fibers, and that over time it may be digested by the lung tissue, although its damage is left behind.

I use appropriate methods to select and process the blocks for analysis and my methods are reliable.

The studies cited by Dr. Swedarsky have numerous issues which prevent them from being reliable in reviewing this case. These include the relatively short time between the last exposure and analysis in many of the studies, different exposure histories in the study cases and Mr. Murphy, and changes in technique over the years.

My analysis is consistent with and complies with commonly accepted principles of fiber burden analysis.

4. My conclusion is That this tissue shows fibrosis, occupational fiber burden and the presence of commercial asbestos fiber types. Mr. Murphy clearly had an occupational exposure to asbestos. Appendix 000539 – 000541.

³ Dr. Gordon was not challenged on his qualifications.

At a hearing held on June 28, 2023, the Board testified that it maintained its diagnosis of idiopathic pulmonary fibrosis, and further stated that it relied on a publication by Dr. Roggli from 1994 for the findings regarding tissue fiber burden. Appendix 000547 – 000570.

Dr. Kinder testified as follows regarding Dr. Gordon's description of half-life of fibers:

What he proposed was something I'd never read before, I'd never heard before, and it is thought provoking. He proposed that given the half-life of the fibers and there was like one I think there was one chrysotile fiber, the rest was amphiboles. **But given the half-life of the amphibole fiber and the fact that this gentleman, per ALJ report, was not exposed from 06/01/85, then the degradation of the natural body's ability to degrade and get rid of these fibers would have resulted in a very low number of fibers.** And that was, I think that was part of his argument as to why he would still consider this to be a significant amount of fibers found in the pulmonary tissue. **I got to be honest with you, I had to go back and read quite a bit of my book from Dr. Roggli's original book and try to surmise this and basically deduce which line of thought I believed the most.** Again, I am not a pathologist. But if you reason with Dr. Roggli's evaluation and what he put in his book and then Dr. Swardowski applying that to his opinion, I do not know if the persons who were examined in Dr. Roggli's series or Dr. Church's series ... **again, we're talking about 70 people or somewhere along those lines . . . I do not know if they had been currently exposed, if they were 20 years removed from exposure. I don't know those answers to those questions.** All I know is that they came down to a certain fiber count related to asbestosis. Below that, there could be asbestosis, but highly unlikely, and the lower you get, the more unlikely it is.

Appendix 000554 – 000555.

In his affidavit, Dr. Gordon described at length the basis for his opinion that Dr. Roggli's studies were out of date because of the use of exposed populations as controls, and the passage of time from last exposure:

5. The controls I use have been controlled for confounding factors of nonoccupational or uncharacterized exposures. Much of Dr. Swedarsky's reliance on Dr. Roggli is misplaced. His "controls" are not controls since they included people in the military on ships containing friable asbestos and people that worked in trades that were known to have asbestos exposure. For that reason, I do not consider Dr. Roggli's "controls" as reliable, since those may have occupational exposures.

6. The only other controls published are by Dr. Dodson. He only screens from an East Texas population that are not directly exposed in their occupations, However, it was well known that asbestos was ubiquitous in East Texas based on the manufacturing plants present. He did not screen for family members that worked in these factories nor did he take into consideration any other types of exposure. For this reason, I do not believe his "controls" offer guidance here.
Appendix 000541.

Dr. Gordon states that the controls used by Dr. Roggli and Dr. Dodson are not appropriate controls because they do not in fact "control" for other exposures. They are populations which have exposure to asbestos. These studies were relied upon by the Employer's expert, Dr. Swedarsky.

Dr. Gordon continued,

11. In paragraph four of page 15, Dr. Swedarsky quotes from an article written by Dr. Churg in 1982. This article does not represent what will be found in patients unexposed in asbestos today. He states that Churg did say it was primarily chrysotile which based on the above explanations would be completely gone in these patients 20 or more years later. Further, he goes on to give numbers seen with asbestotics and with mesotheliomas. However the tissue from these people were studies very close to their exposures. It is well known that chrysotile in particular as well as the amphiboles can be equated with a hit and run event, The fibers initially have an effect on the cells and DNA either directly or indirectly through cellular mechanisms that cause mutations in the DNA. With multiple "hits" this can transform the cells into cancer or initiate a fibrotic exposure and this is in the absence of the fiber itself. It is frequently digested away. Appendix 000545 – 000546.

Dr. Gordon stated,

He (Dr. Swedarsky) concludes that the number of fibers found in my analysis was not adequate. However, he failed to consider, once again, that asbestos was removed from all the he (the claimant's decedent) worked with by the early 1980's. In light of the passage of time it was amazing that we found the asbestos fibers we were able to identify. Appendix 000544 - 000555.

The essence of the appeal is that the Occupational Pneumoconiosis Board rejected the more recent findings made by Dr. Gordon based on studies from Dr. Roggli that were nearly 30 years old. As Dr. Gordon shows, the natural elimination of the chrysotile bodies from lung tissue

over the decades since significant asbestos exposure ended explains the findings today. The O. P. Board simply applied old, outdated information and therefore erred in rejecting the report and affidavit of Dr. Gordon.

The BOR stated in its decision that there was inadequate exposure:

Dr. Kinder said Dr. Swedarsky did not feel there was enough occupational exposure for the decedent to have asbestosis and felt this was more likely a pulmonary fibrosis not related to occupational exposure. Dr. Gordon disagreed and believed there was enough occupational exposure to explain the pulmonary fibrosis. Appendix 000577.

The Third-Party Administrator issued a presumptive non-medical Order, and as set forth below, the findings of exposure were not rebutted.

STANDARD OF REVIEW

The standard of review is set forth in West Virginia Code § 23-5-12a(b) (2022), in part, as follows:

The Intermediate Court of Appeals may affirm the order or decision of the Workers' Compensation Board of Review or remand the case for further proceedings. It 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.

SUMMARY OF ARGUMENT

As set forth below in more detail, the Petitioner contends that she showed by affidavit and report of Dr. Gordon that the Decedent had exposure to the hazards of occupational disease-asbestosis. Dr. Gordon identified by accepted scientific procedures that the Decedent's lungs

contained an occupational burden of asbestos, including commercial fibers. The report of Dr. Gordon is well reasoned, based on a review of the relevant medical records.⁴ The BOR erred in failing to accord weight to the opinion of Dr. Gordon, and to properly apply the holding of *Bradford* and *Powell*, supra. The testimony of the Occupational Pneumoconiosis Board that they found the 30-year-old standard more reliable than the opinions of Dr. Gordon, as set forth in his affidavit, was unreliable and not supported by the record. The decision of the BOR denying benefits should be reversed, as clearly wrong in light of the reliable, probative, and substantial evidence on the whole record.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument will significantly aid the decisional process with regard to the application of the law to the facts and standards of appeal at issue.

ARGUMENT

THE OFFICE OF JUDGES AND THE BOARD OF REVIEW ERRED IN APPLYING *Bradford v. Workers' Compensation Comm'r*, Syl. Pt. 3, 185 W.Va. 434, 408 S.E.2d 13 (1991)

In *Bradford v. Workers' Compensation Comm'r*, Syl. Pt. 3, 185 W.Va. 434, 408 S.E.2d 13 (1991), the Court held that in order to establish entitlement to dependent's benefits, a claimant must show that an occupational disease or injury "contributed in any material degree to the death."

The evidence shows that the Gordon report exceeded the standard required by *Bradford*. Here, the Petitioner showed that the Decedent worked in an environment characterized by the

⁴ Dr. Kinder testified that Dr. Ronald Gordon, PhD, then did a thorough review as well and listed several reasons as to why he disagreed with Dr. Swedarsky. O. P. Hearing transcript page 7. Again, you have prosecutors on both sides of this issue, one on each side, Dr. Swedarsky and Dr. Gordon, one an MD pathologist, one a PhD researcher, both giving very good arguments, I feel. Transcript page 17. Appendix 000563.

presence of asbestos and silica. The West Virginia Workers Compensation Statute provides the following definition of occupational pneumoconiosis:

(d) Occupational pneumoconiosis is a disease of the lungs caused by the inhalation of minute particles of dust over a period of time due to causes and conditions arising out of and in the course of the employment. The term "occupational pneumoconiosis" includes, but is not limited to, such diseases as silicosis, anthracosilicosis, coal worker's pneumoconiosis, commonly known as black lung or miner's asthma, silicotuberculosis (silicosis accompanied by active tuberculosis of the lungs), coal worker's pneumoconiosis accompanied by active tuberculosis of the lungs, asbestosis, siderosis, anthrax, and any and all other dust diseases of the lungs and conditions and diseases caused by occupational pneumoconiosis which are not specifically designated in this section meeting the definition of occupational pneumoconiosis set forth in this subsection.

(e) In determining the presence of occupational pneumoconiosis, x-ray evidence may be considered, but may not be accorded greater weight than any other type of evidence demonstrating occupational pneumoconiosis.

W. Va. Code 23-4-1(d) and (e).

Under *Powell*, the claimant is not required to prove that his exposure was the sole or exclusive cause of his disease. *Powell* states:

The employer's argument on the burden of persuasion in an occupational disease case is also unavailing. First, this contention is not supported by the statutory language. W. Va. Code § 23-4-1 does not require a claimant to prove that the conditions of his employment were the exclusive or sole cause of the disease nor does it require the claimant to show that the disease is peculiar to one industry, work environment, or occupation. Although evidence pertaining to cigarette smoking may be relevant in determining whether the statutory standards have been met, the claimant need not negative all possible non-occupational causes of the disease. We rejected that argument in Syllabus Point 1 of *Myers v. State Workmen's Compensation Comm'r.*, supra, where we held:

A claimant in a workmen's compensation case must bear the burden of proving his claim but in doing so it is not necessary to prove to the exclusion of all else the casual connection between the injury and the employment. Syl. pt. 2, *Sowder v. State Workmen's Compensation Comm'r.*, 155 W. Va. 889, 189 S.E.2d 674 (1972). Emphasis added.

The Supreme Court has held: "When it appears from the proof upon which the Workmen's Compensation [Board of Review] acted that its finding was plainly wrong an order reflecting that

finding will be reversed and set aside by this Court." Syllabus point 5, *Bragg v. Comm'r*, 152 W. Va. 706, 166 S.E.2d 162 (1969). Syl. pt. 1, *Bowers v. Comm'r*, 224 W. Va. 398, 686 S.E.2d 49 (2009). See also Syl. pt. 4, *Emmel v. State Comp. Dir.*, 150 W. Va. 277, 145 S.E.2d 29 (1965) ("An order of the workmen's compensation appeal board, approving an order of the state compensation commissioner, will be reversed by this Court on appeal, where the legal conclusions of the appeal board are erroneous.").

The purpose of the Workers' Compensation system as stated W Va. Code, § 23-1-1(b): "It is the further intent of the Legislature that this chapter be interpreted so as to assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits " [Emphasis added.] Further, at W. Va. Code, §23-1-1 (c), declares, "The purpose of the commission is to ensure the fair, efficient and financially stable administration of the workers' compensation system of the state of West Virginia." [Emphasis added.]

THE BOARD FAILED TO IDENTIFY A SPECIFIC NON-OCCUPATIONAL CAUSE OF THE PETITIONER'S DECEDENT'S INTERSTITIAL FIBROSIS

The Board was unable to identify the cause of the idiopathic interstitial fibrosis. Dr.

Kinder testified:

Q. Are you able to identify the cause of the fibrosis anymore beyond saying idiopathic, which means you can 't guess a cause?

A. If I could , that would be wonderful , but no , sir, I cannot. Hearing Transcript page 11

Q. And , Doc (SIC), the employer lawyer asked the radiologist about other conditions that could result in fibrosis , but he was unable to make a diagnosis of those other conditions that could result in fibrosis here , is that right?

A. I will not speak for the radiologist.

**Q. Well , I should 't say, you agree that
you all can't make
27 a diagnosis of an alternative cause of this
28 extensive fibrosis other than calling it idiopathic?
29 DR. LEEF: That is an alternative.
30 DR. KINDER: That is an alternative diagnosis, yes .
31 DR. LEEF: Idiopathic just contains a lot of options .
32 ATTORNEY SKAGGS: Right. And you can't identify within the
33 idiopathic statement which of those various options
34 are present?
DR. LEEF: Not based on the CT, no. But if he had studies
2 that showed gastroesophageal reflux or, you
3 know ...
4 DR. KINDER: Aspiration .
5 DR. LEEF: Did he have gout? Did he have recurrent
6 pneumonia from aspiration? I don't know.
7 Rheumatoid? Yeah . The point is , those are all
8 alternative diagnoses. None of the evidence on
9 the x-ray or the CT are indicative of asbestos or
10 asbestosis .
11 DR. KINDER: I do know from the medical records from this
12 gentleman , he did have gastroesophageal reflux
13 disease as a risk factor.
14 BY ATTORNEY SKAGGS:
15 Q And there are numerous references in the medical
16 records to restrictive type disease. But that's
17 consistent with the idiopathic pulmonary fibrosis ,
18 just as it will be consistent with extensive irregular
asbestos and fibrosis . Is that correct?
A. I'm sorry , would you say that again?
Q. Yeah , I' ll try again. Restrictive disease is consistent
with both idiopathic pulmonary fibrosis and also
would be consistent with an asbestosis?
Q. Well , again , as Dr. Leef had remarked , there were no
pleural plaques that we find . There are no
calcifications, pericardial or parietal pleural that
you can see that would be consistent with an
asbestos related disease . So, it would be more
consistent with an IPF than it would be with an
asbestos-related pleural disease or asbestos
Appendix 000557 – 000561.**

On Reexamination, Dr. Kinder agreed that there was nothing in the records to diagnose GERD as an alternative cause:

**A. All right. And there's nothing in these records that
8 specifically diagnose pulmonary complications from
9 GERD or achalasia?**

10 A Not directly, no .

Transcript page 22

Appendix 000568.

West Virginia Code § 23-4-8c(b), provides:

If it can be shown that the . . . deceased employee has been exposed to the hazard of inhaling minute particles of dust in the course of and resulting from his or her employment for a period of ten years during the fifteen years immediately preceding the date of his or her last exposure to such hazard and that the . . . deceased employee has sustained a chronic respiratory disability, it shall be presumed that . . . the deceased employee was suffering at the time of his or her death from occupational pneumoconiosis which arose out of and in [*8] the course of his or her employment. This presumption is not conclusive.

The Board agreed that they could not identify a specific cause of the interstitial fibrosis.

As set forth above, the Petitioner here is not required to rebut or disprove all alternative causes.

The O. P. Board did not say more than that the term “idiopathic” includes a “lot of options.” The Board failed to identify an alternative cause as required by law. Its findings do not support a finding that the presumption established by the non-medical order has been rebutted where there was an appropriate non-medical finding, evidence of occupational exposure, a supporting expert report, and no clear diagnosis.⁵

The Board of Review is clearly wrong in adopting the findings of the O. P. Board that the presumption has been rebutted. The record does not support a rebuttal of the presumption and the Petitioner should have been given the benefit of the presumption. The failure to do is an error as a matter of law.

⁵ In the recent case of *Bayer Corp. v. Virden*, 2022 W. Va. App. LEXIS 15 this Court noted in footnote 7 the following: 7 While we affirm in the present case, we caution the Board that before finding that an "equal amount of evidentiary weight" exists for both sides, as permitted by West Virginia Code § 23-4-1g, whenever possible it should use any and all available judicial tools, including hearings, to attempt to make a determination whether the evidence for one side is more persuasive. Reliance on the "equal weight" provision should be a rarity in these claims, even in light of the discussion in *Williams* 2016 IV Va. LEXIS 127 2016 WL 765751. The Board had judicial resources to further investigate the claim if it wanted.

THE BOARD AGREED THAT THE DECEDENT
HAD EXPOSURE TO COMMERCIAL ASBESTOS FIBERS AS
DEMONSTRATED IN THE TISSUE DIGESTION STUDIES

Dr. Kinder agreed that commercial asbestos fibers were identified in the samples:

I don't have it in front of me, but he found commercial fibers that were there. Again, I think that is not in dispute. I would not dispute that. I think he does make again a very good argument, and maybe you were alluding to that, I should wait 'til you asked the question, but the background amount of fibers. There are no studies for background fibers in 2023. There were studies for background fibers. If you walk down the city in New York City, New York, then they could say approximately how many fibers you would have in your lungs in 1978 or whatever. We don't have that background fiber now. Hearing Transcript page 12. Appendix 000558.

Dr. Kinder also agreed that the studies from Dr. Roggli did not establish current

“background” levels:

Q And isn't that his comment about Dr. Roggli's background studies is they don't control for adequately for exposures in this day and age because we don't know which of those people may have had these other exposures in the naval 3 services or ship industries and so forth.

A. and I agree with that statement, but there are no studies to tell us that either. That's a good theory, and it would be something that would be wonderful if someone would research that, but we don't have it. As you're aware, it was estimated that around 2020, because of the abatement and everything else and the delay, mesothelioma would start to turn down. I'm not sure if that has occurred yet or not, but because of abatement in the 80s, that was theorized hypothesis put forth. Hearing Transcript pages 12 - 13. Appendix 000558 – 000559.

Dr. Kinder agreed that there is a half-life for asbestos fibers in lung tissue:

Q. But you do recognize that there are half-lives and

associated with at least certain of the fiber types?

A Yes, sir. I think it's somewhere between a year-and-a-half, two-and-a-half for the shortest, something like that, up to nine years , and I don't remember which one was nine years.

Q. And here, if we assume that his exposures to asbestos ceased or significantly diminished to a trivial amount in the early 80s, then it is .. obviously the arithmetic is the many years that interspersed between that event and his autopsy, right?

A. Correct.

Appendix 000560.

Here, the O. P. Board relied on 30-year-old information in lieu of the evidence offered by the Petitioner. The O. P. Board relied on a textbook from 1994 (Appendix 000552) which is 29 years out of date. As Dr. Gordon said, the issue here is that asbestos fibers were found consistent with commercial uses. The evidence of exposure was sufficient to establish causation for fibrosis based on the digestion studies and the presumption.

**THE BOARD ERRED IN FAILING TO PROPERLY
APPLY THE WEIGHING OF THE EVIDENCE STATUTE**

West Virginia Code § 23-4-1g(a) (2003) provides the following:

For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. **The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented.** Under no circumstances will an issue be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. If, after weighing all of the evidence regarding an issue in which [*7J a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted.

In this case, the O. P. Board and BOR did not properly evaluate the evidence. The studies cited by the Employer's expert and the Board were decades out of date. As the Board admitted, certain asbestos fibers are digested, so fewer fibers will be found years after exposure ended. As Dr. Gordon stated in his affidavit, it is remarkable that any commercial fibers were found, given the years that had passed since exposure ended. The weighing statute establishes a process to review evidence. Here, the O. P. Board and the BOR failed to follow that process.

CONCLUSION

The Board of Review shall reverse, vacate, or modify the order or decision of the administrative law judge if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative law judge's findings are:

- (1) In violation of statutory provisions; or
 - (2) In excess of the statutory authority or jurisdiction of the administrative law judge; or
 - (3) Made upon unlawful procedures; or
 - (4) Affected by other error of law; or
 - (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.
- W. V. Code §23-5-12(b)

In the words of W. Va. Code § 23-4-1g (2003) this claim had merit. The Board had a presumptive case before it and was unable to identify with a reasonable degree of medical probability the alternative cause of the fibrosis. The Board of Review violated the statutory requirement regarding the presumption and was clearly wrong in light of the record in finding the presumption had been rebutted.

The Board's testimony confirmed the occupational history and exposure to commercial asbestos fibers. Dr. Kinder testified that not every person with exposure developed asbestosis, not every person with exposure developed plaque. In this case, the rebuttal was not rebutted.

Further, the weighing statute was not properly followed, as required by the statute.

The BOR was clearly wrong in failing to rule in the Petitioner's favor and reverse the decision of the Third-Party Administrator. The Order of the BOR should be reversed and the claim remanded for entry of an Order awarding benefits.



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**Petitioner,
By Counsel:**

BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

No. 23 - _____

HAROLD R. MURPHY (DECEASED)
LINDA MURPHY, WIDOW

PETITIONER,

V.

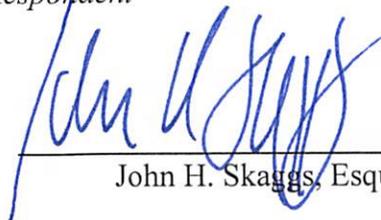
SAINT GOBAIN CERAMICS & PLASTICS,
EMPLOYER,
AND WEST VIRGINIA OFFICES OF THE
INSURANCE COMMISSIONER – OLD FUND

RESPONDENT,

CERTIFICATE OF SERVICE

I hereby certify that the foregoing “**Brief in Support of Appeal**” was filed October 11, 2023, using the File & Serve Express system, to counsel of record named below:

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