

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

David Milano,
Claimant Below, Petitioner

v.) **No. 24-13** (JCN: 2022017301)
(ICA No. 23-ICA-86)

Mountaineer Dough, LLC,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner David Milano appeals the November 1, 2023, memorandum decision of the Intermediate Court of Appeals of West Virginia (“ICA”). Respondent Mountaineer Dough, LLC filed a timely response.¹ The issue on appeal is whether the ICA erred in reversing the February 23, 2023, decision of the West Virginia Workers’ Compensation Board of Review. In its decision, the Board reversed the claim administrator’s April 5, 2022, order and held the claim compensable. Upon our review, we determine that oral argument is unnecessary and that this case satisfies the “limited circumstances” requirement of Rule 21(d) of the Rules of Appellate Procedure and is appropriate for vacating the ICA’s decision and remanding the case to the Board of Review in a memorandum decision rather than an opinion. *See* W. Va. R. App. P. 21.

In the early morning hours of February 20, 2022, the claimant, the employer’s general manager, allowed the other employees to leave work and was closing up the restaurant when a robbery occurred. The robbers pushed the claimant, causing him to step back against a doorjamb, and tied him up. The claimant filed the instant claim alleging that the robbers injured him. In the physician’s section of the claim form, Lindsay² of MedExpress Urgent Care found that the claimant suffered an occupational injury to his cervical spine and made a diagnosis of radiculopathy. In addition, on a workers’ compensation duty form, Heather Hartsell, N.P., placed the claimant on modified duty as of February 24, 2024, with diagnoses of nausea and cervical radiculopathy. Ms. Hartsell prescribed physical therapy for the claimant.

However, the various diagnostic tests that the claimant underwent were normal. For example, an EMG study showed “no electrodiagnostic evidence suggestive of a left brachial

¹ The petitioner is represented by counsel J. Thomas Greene, Jr. and T. Colin Greene, and the respondent is represented by counsel Steven K. Wellman.

² The healthcare professional’s last name is not legible.

plexopathy or a left cervical radiculopathy.” Based on the EMG study, Shumalla Sultan, M.D., recommended that the study’s result should be correlated with the clinical findings in the claimant’s case.

In April 2022, Randall Short, D.O., reviewed the video footage of the robbery and the claimant’s medical records, finding that (1) the video footage did not show that the claimant suffered an injury during the robbery, and (2) the diagnostic test results and the objective findings from the claimant’s physical examinations do not support the existence of an injury. Based on Dr. Short’s report, the claim administrator denied the claim.

The claimant testified at deposition in August 2022. The claimant stated that the robbery began when he was taking a smoking break. The claimant testified that two masked men with guns came up to him and “pushed [him] back through the doorway.” The claimant stated that he was also “thrown up against the door frame,” hitting his neck and back. The claimant testified that he complied with the robbers’ demands and gave them a few hundred dollars in cash. Before the robbers left, the claimant stated that they tied him up. Following the robbers’ departure, the claimant testified that he untied himself and contacted law enforcement. Since the robbery, the claimant stated that he has experienced some neck and lower back pain and some incontinence. The claimant testified that his injuries also included impinged nerves in his left arm and leg and limited grip strength and tactility through his left hand. The claimant stated that he has difficulty in standing and in lifting and extending his arms over his head. The claimant testified that he has not returned to work since the robbery.

In October 2022, Samuel C. Wordeman, Ph.D., a biomechanical engineer, reviewed the video footage of the robbery and the claimant’s medical records. Dr. Wordeman found that the video footage showed the claimant “being lightly pushed backwards, resulting in contact between his back, and possibly his neck and/or pelvis, and the door jamb to the manager’s office.” Dr. Wordeman determined that between the time the claimant “is initially pushed by the intruder to the time that his body contacts the door jamb, he moves no more than 2.5 feet over the course of approximately 500 to 670 milliseconds” and that “[t]hese data demonstrate that [the claimant]’s body had a maximum velocity of approximately 2.4 to 3.4 miles per hour when it contacted the door frame.” Dr. Wordeman opined that the contact of the claimant’s body with the doorjamb as showed in the video footage did not cause an injury to the claimant and explained that any motion of the claimant’s head, torso, spine, or extremities did not extend beyond “a normal physiological range.” Regarding the claimant’s medical records, Dr. Wordeman stated that there were no objective findings of an injury to the cervical, thoracic, and lumbar spines.

In February 2023, the Board of Review reversed the claim administrator’s order denying the claim. The Board found that the medical evidence and the claimant’s testimony showed that an injury occurred in the course of and resulting from the claimant’s employment with a compensable diagnosis of cervical radiculopathy. In making this finding, the Board specifically determined that the claimant’s testimony was “reliable.” However, while the Board noted that it reviewed the video footage of the robbery, it did not make any findings regarding what the footage showed about how the claimant was injured. In *Mountaineer Dough, LLC v. Milano*, No. 23-ICA-86, 2023 WL 7202965 (W. Va. Ct. App. Nov. 1, 2023) (memorandum decision), the ICA found

that the Board’s findings were “entirely inadequate” and “incomplete as they did not include any summarization of the security footage.” *Id.* at *3. The ICA also observed that adequate findings are necessary to allow for meaningful appellate review. *Id.* at *4. Nevertheless, the ICA did not remand the case to the Board for it to make findings regarding what the video footage showed about how the claimant was injured. Instead, the ICA substituted its decision for that of the Board in finding that the claimant did not suffer an injury in the course of and resulting from his employment. *Id.*

This Court reviews questions of law de novo, while we accord deference to the Board of Review’s findings of fact unless the findings are clearly wrong. *See* Syl. Pt. 3, *Duff v. Kanawha Cnty. Comm’n*, 250 W. Va. 510, 905 S.E.2d 528 (2024). “An appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact.” *State v. Guthrie*, 194 W. Va. 657, 669 n.9, 461 S.E.2d 163, 175 n.9 (1995). Furthermore, “in cases where there is an absence of adequate factual findings, it is necessary to remand the matter to the lower [tribunal] to state or, at a minimum, amplify its findings so that meaningful appellate review may occur.” *Mullins v. Mullins*, 226 W. Va. 656, 662, 704 S.E.2d 656, 662 (2010); *see also Province v. Province*, 196 W. Va. 473, 483 n.19, 473 S.E.2d 894, 904 n.19 (1996) (“Where the lower tribunal[] . . . mak[es] only general, conclusory or inexact findings[,] we must vacate the judgment and remand the case for further findings and development.”). Thus, we find that the ICA erred in substituting its decision for that of the Board of Review instead of remanding this case to the Board for it to make findings regarding what the video footage showed about how the claimant was injured. Therefore, we vacate the ICA’s decision in *Milano* and remand the case to the Board of Review with directions that it make such findings that are sufficient to permit meaningful appellate review of the compensability issue.

Vacated and
Remanded with Directions

ISSUED: January 14, 2025

CONCURRED IN BY:

Chief Justice William R. Wooton
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice C. Haley Bunn
Justice Charles S. Trump IV