

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Joseph Kessler,
Claimant Below, Petitioner

v.) **No. 26-178** (JCN: 2024027585)
(ICA No. 25-ICA-275)

West Virginia Paving, Inc.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Joseph Kessler appeals the February 6, 2026, memorandum decision of the Intermediate Court of Appeals of West Virginia (“ICA”). Respondent West Virginia Paving, Inc., filed a timely response.¹ The issue on appeal is whether the ICA erred in affirming the June 9, 2025, decision of the West Virginia Workers’ Compensation Board of Review, which affirmed the order of the claim administrator rejecting the occupational pneumoconiosis (“OP”) claim. Upon our review, we determine that oral argument is unnecessary. 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.

The claimant is a retired underground coal miner and dump truck driver. The claimant most recently worked as a dump truck driver for the employer making deliveries for its quarry from 2013 to 2022. In June 2024, the claimant filed an application for OP benefits, listing eighteen total years of alleged occupational dust exposure. The claimant also underwent chest x-rays, which were read in July 2024. Kathleen A. DePonte, M.D., opined that the chest x-rays showed insufficient parenchymal or pleural changes to establish a diagnosis of OP.

In August 2024, Richard Spencer, M.D., and Angela Baker, PA-C, completed a physician’s report of OP. Dr. Spencer and Ms. Baker found that the claimant had shortness of breath on exertion with a cough throughout the day. They stated that the claimant used an inhaler every four hours. Dr. Spencer and Ms. Baker concluded that the claimant had contracted OP. However, Dr. Spencer and Ms. Baker answered “unknown” as to how long the claimant has suffered from OP and also referred to the claimant as a retired “miner” instead of a retired dump truck driver.

¹ The petitioner is represented by counsel Reginald D. Henry and Lori J. Withrow, and the respondent is represented by counsel Alysia Kozlowski.

At a September 2024 deposition, the claimant testified that he was exposed to abnormal levels of occupational dust in his most recent job of dump truck driver for the employer but also stated that he was exposed to coal and rock dust in two of his former jobs as an underground coal miner. The claimant acknowledged that he had “more direct exposure” to occupational dust in his coal mining jobs given that they were underground. The claimant stated that his dump truck was loaded and unloaded in an open air environment and that he stayed in the truck’s cab during each process. The claimant explained that he was not allowed to exit the cab due to safety concerns and that he also was required to stay in the cab during unloading so he could “control the dump rate.” However, the claimant testified that the truck’s cab would be so filled with dust that he needed to clean it “regularly” and that after his shift, dust would come out when he blew his nose.

In June 2025, the Board of Review affirmed the claim administrator’s order rejecting the OP claim, finding that the claimant did not show that he was exposed to the hazards of OP during the course of and as a result of his employment as required by West Virginia Code § 23-4-1(b). In *Kessler v. West Virginia Paving, Inc.*, No. 25-ICA-275, 2026 WL 323318 (W. Va. Ct. App. Feb. 6, 2026) (memorandum decision), the ICA affirmed the Board of Review’s decision but admonished the Board for failing to make a clear finding about the claimant’s credibility. *Id.* at *3 & n.3.

The claimant appeals the ICA’s affirmation of the Board of Review’s decision affirming the rejection of his OP claim under the eligibility requirements set forth in West Virginia Code § 23-4-1(b). 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). West Virginia Code § 23-4-1(b) provides, in pertinent part, that

compensation is not payable for the disease of [OP] . . . unless the employee has been exposed to the hazards of [OP] in the State of West Virginia over a continuous period of not less than two years during the 10 years immediately preceding the date of his or her last exposure to such hazards, or for any five of the 15 years immediately preceding the date of his or her last exposure.

In Syllabus Point 1, in part, of *Meadows v. Workmen’s Compensation Commissioner*, 157 W. Va. 140, 198 S.E.2d 137 (1973), this Court held that “a ‘hazard,’ as contemplated by [West Virginia Code § 23-4-1(b)], as amended, exists in any work environment where it can be demonstrated that there are minute particles of dust in abnormal quantities.”

On appeal, the claimant asserts that the Board of Review relied on certain parts of the claimant’s testimony while apparently finding other sections of his testimony not to be credible. The claimant argues that in *Kessler*, the ICA recognized that the Board of Review’s failure to make a clear finding about his credibility raised due process concerns. 2026 WL 323318, at *3 n.3 (citing *Workman v. ACNR Res., Inc.*, 251 W. Va. 796, 801 n.7, 916 S.E.2d 638, 643 n.7 (2025)).²

² Both the ICA in *Kessler* and this Court in *Workman* cited *Gwinn v. JP Morgan Chase*, No. 23-172, 2024 WL 4767011 (W. Va. Nov. 13, 2024) (memorandum decision), in which we

Therefore, the claimant argues that his OP claim should be accepted under West Virginia Code § 23-4-1(b) or, in the alternative, remanded to the Board of Review with directions to provide a proper analysis of why it found his testimony, or certain parts of it, not to be credible. The employer counters that the Board's determination of the claimant's credibility is entitled to deference.

In affirming the rejection of the OP claim pursuant to West Virginia Code § 23-4-1(b), the ICA found that the Board of Review made an implicit finding that the claimant's testimony was not credible. *Id.* at *3 n.3. However, the ICA further stated that "[t]he Board [of Review] also relied on" at least one part of the claimant's testimony in finding that he failed to show that he was exposed to abnormal levels of occupational dust in his job with the employer. *Id.* at *3. Thus, the Board of Review made inexact findings about the claimant's credibility. "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." *Province v. Province*, 196 W. Va. 473, 483, 473 S.E.2d 894, 904 (1996) (footnote omitted). Such a remand is necessary to allow the Board of Review to "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). Therefore, we vacate the ICA's decision in *Kessler* and remand the case to the Board of Review with directions that it make appropriate findings as to whether it found the claimant's testimony, or certain parts of it, not to be credible.

Vacated and
Remanded with Directions

ISSUED: September 2, 2026

CONCURRED IN BY:

Justice William R. Wooton
Justice Charles S. Trump IV
Justice H. L. Kirkpatrick

DISSENTING:

Chief Justice C. Haley Bunn
Justice James W. Flanigan

observed that "[t]he ICA was mistaken . . . [in] stat[ing] that the . . . 'credibility' determinations" regarding the claimant's treating physician were entitled to deference because no such determinations were made. *Id.* at *4.

Bunn, Chief Justice, dissenting:

I dissent to the majority's resolution of this case. I would have set this case for oral argument to thoroughly address the error alleged in this appeal. Having reviewed the parties' briefs and the issues raised therein, I believe a formal opinion of this Court was warranted, not a memorandum decision. Accordingly, I respectfully dissent.

Flanigan, J., dissenting:

I disagree with the majority's decision to vacate the Intermediate Court of Appeals' ("ICA") memorandum decision and remand this case to the Board of Review ("BOR") for clarification of its findings. In my view, this is not a situation where the BOR made inexact findings. Rather, this is an instance where the BOR allowed certain evidence to be dispositive and ignored the rest to reach the desired result. When all the evidence is considered, it is clear the claimant's uncontradicted testimony conclusively established that he was exposed to the hazards of occupational pneumoconiosis ("OP") on a daily basis while working for the employer, thereby satisfying the requirements of West Virginia Code § 23-4-1(b) (2024).

To be eligible for OP benefits, a claimant must have been exposed to the "hazards" of OP within certain time frames. W. Va. Code § 23-4-1(b). In this case, there is no dispute that the claimant satisfied the time requirements. The issue is whether his most recent work exposed him to the "hazards" of OP. This Court has held that a "hazard" of OP as contemplated by the statute "exists in any work environment where it can be demonstrated that there are minute particles of dust in abnormal quantities." Syl. Pt. 1, in part, *Meadows v. Workmen's Comp. Comm'r*, 157 W. Va. 140, 198 S.E.2d 137 (1973). Here, the BOR found that the claimant "experienced only occasional and brief periods of dust exposure" and failed to establish that he was exposed to abnormal quantities of dust as required by *Meadows*. However, to reach this decision, the BOR disregarded a substantial portion of the claimant's unrefuted testimony.

During his deposition, the claimant testified that he was employed as a truck driver, working ten-hour shifts, five days a week. He explained that his job duties required him to haul sand, gravel, and riprap (bigger stones) to customers outside the employer's quarry. He testified that he drove through the quarry multiple times a day, sitting in the loading line for thirty minutes at a time with his windows down in the summertime. He described the loading process as taking only about ten minutes but requiring the dumping of at least six buckets of sand and stone from twelve feet above his truck, producing a large amount of rock dust every time. He further testified that he was exposed to dust while traveling across dirt roads to deliver the product and during the unloading process. The claimant indicated that he was in a "constant battle" with the dust that built up inside the cab of his truck, requiring him to clean it at the end of each shift. When asked about the effect of being exposed to the rock dust every day, the claimant stated, "Every time I would come in at night and blow my nose, I would get dust out of it."

In rejecting the claim, the BOR focused on the fact that it only took about ten minutes to load the claimant's truck and that he remained in the cab of the truck while the loading occurred. The BOR completely disregarded the claimant's testimony that he waited in line inside the quarry

for thirty minutes at a time, multiple times a day, while other trucks were loaded; that he was exposed to more dust while traveling to and from customer locations and delivering the product; and that dust constantly collected inside the cab of his truck, requiring him to clean it daily. In resolving any issue, West Virginia Code § 23-4-1g(a) (2003) prohibits the fact finder from only “allowing certain evidence to be dispositive” and demands that all evidence be considered. *See Workman v. ACNR Resources, Inc.*, 251 W. Va. 796, 803, 916 S.E.2d 638, 645 (2025) (reiterating “statutory mandate that factfinder properly consider the evidence before it” and finding BOR was clearly wrong when it “impermissibly ignored the reports of [claimant’s] treating medical professionals”). Consequently, in the absence of any evidence presented by the employer to contradict any of the claimant’s testimony, the BOR plainly erred by affording only certain parts of the claimant’s testimony evidentiary weight and ignoring the rest. In these circumstances, further findings are not required. The BOR’s decision was clearly wrong so it should have been reversed, and this case should have been remanded for entry of an order holding the claim compensable on a non-medical basis for OP benefits. Accordingly, I respectfully dissent.