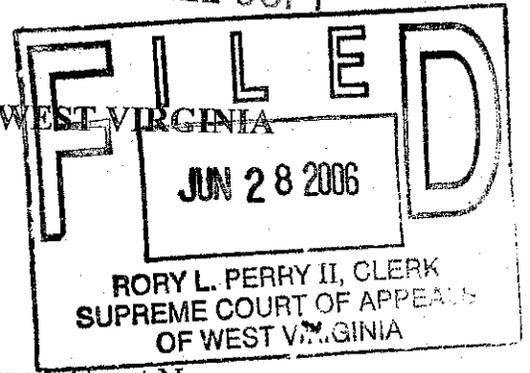


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Before  
THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
Charleston, West Virginia



THE FENTON ART GLASS COMPANY,  
Petitioner,

Supreme Court No. \_\_\_\_\_

Appeal No. 70568

Claim No. 98-24140 OP

v.

JACK GARRISON and WEST VIRGINIA  
OFFICE OF THE INSURANCE COMMISSION,  
Respondents.

---

**BRIEF IN SUPPORT OF  
PETITION FOR APPEAL ON BEHALF OF PETITIONER,  
THE FENTON ART GLASS COMPANY**

---

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June 28, 2006

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**BRIEF IN SUPPORT OF  
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---

**I. STATEMENT OF THE CASE**

This case involves a claim for occupational pneumoconiosis benefits filed by Jack Garrison (hereinafter "Claimant") on November 4, 1997. The Claimant alleges that he was exposed to dust and asbestos while working for The Fenton Art Glass Company (hereinafter "Employer") since August 19, 1968. A non-medical order was entered on February 16, 1998, finding the Employer to be the chargeable employer within the meaning of the statute. Appendix 1. The Employer protested the non-medical ruling.

In support of its protest, the Employer introduced the January 2000 reports of Dr. Terrance Stobbe (Appendix 2), the transcript of the July 26, 2000 deposition of Dr. Stobbe (Appendix 3), the November 17, 2000 report of Dr. Donald McGraw (Appendix 4), the transcript of the October 30, 2001 deposition of Dr. McGraw (Appendix 5), and the November 22, 2000 affidavit of the Employer's Safety Director (Appendix 6). In response, the Claimant introduced the transcript of a second deposition of Dr. Stobbe conducted on July 26, 2000. Appendix 7. The Claimant's testimony was taken by deposition on March 23, 1998. Appendix 8.

The Employer maintains that the Claimant was not harmfully exposed to the hazards of occupational pneumoconiosis at its Williamstown facility. Twenty-five cases were consolidated in the lead case of Garol Antill, et. al. v. Fenton Art Glass Company by order dated January 25, 2001 for purposes of conducting a *Fraga* hearing. The *Fraga* hearing was conducted on May 21, 2003 in Charleston, West Virginia by Administrative Law Judge Betty Caplan. Appendix 9. Administrative Law Judge Henry Haslebacher affirmed the non-medical order on September 4, 2003. Appendix 10.

Following an evaluation by the Occupational Pneumoconiosis Board (hereinafter "OP Board"), the OP Board concluded that there was insufficient evidence to support a diagnosis of occupational pneumoconiosis. Appendix 11. Accordingly, the

Claimant was granted no award by order of the Division<sup>1</sup> dated June 18, 1998 (Appendix 12), which parties protested.<sup>2</sup>

After the introduction of additional evidence, the OP Board testified at a final hearing on November 10, 2004 that there was insufficient evidence to support a diagnosis of occupational pneumoconiosis. Appendix 13. Judge Haslebacher affirmed the insufficient evidence ruling on December 15, 2004. Appendix 14.

The Claimant appealed the Judge's Decision on the medical issue and the Employer appealed from the Judge's Decision on the non-medical issue to the Board of Review. In an Order dated May 30, 2006, the Board of Review summarily affirmed Judge Haslebacher's Decision on the non-medical issue. In a split decision, however, the Board reversed his Decision on the medical issue and granted the Claimant a 5% permanent partial disability award. Appendix 15.

This proceeding stems from the Employer's petition for appeal from the May 30, 2006 Order of the Board of Review.

---

<sup>1</sup>The Workers' Compensation Division was re-organized into the Workers' Compensation Commission in 2003. The Commission ceased to exist on December 31, 2005. The West Virginia Office of the Insurance Commission, as administrator of the Old Fund, is substituted in the stead in the style of this case.

<sup>2</sup>The Employer protested the insufficient evidence ruling for jurisdictional reasons because the non-medical issue was in litigation on an exposure basis.

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<sup>2</sup>The Employer protested the insufficient evidence ruling for jurisdictional reasons because the non-medical issue was in litigation on an exposure basis.

## II. STATEMENT OF THE FACTS

### Evidence relative to non-medical issue:

The Claimant has worked for the Employer since 1968 as a "warm-in of the glassware." He alleged that he has been exposed to sand, soda ash, glass dust, and asbestos during his employment with the Employer. Appendix 8 at 11-12.

Dr. Stobbe performed studies to assess the air quality at the Employer's facility in Williamstown. He directed industrial hygiene studies on two dates during November 1998 and on two dates in March 1999 to determine the levels of asbestos and respirable dust in the Williamstown plant. He also reviewed the air sampling studies performed at the Employer's facility since 1977. Appendix 2.

Dr. Stobbe stressed that the mere exposure to a substance is not sufficient, in and of itself, to constitute a harmful exposure. Respirable dust is that which is generally small enough to be readily inhaled. If the particles are larger, they are trapped in the upper airways and are expelled through coughing. As a result, the particles are not inhaled. If the particles are not inhaled, they cannot affect lung function. Moreover, even if the individual is exposed to a substance, the exposure must be excessive in order to constitute a hazardous exposure. Appendix 2.

The industrial hygiene studies conducted by Dr. Stobbe demonstrate the absence of any asbestos fibers in six departments of the plant. He also found no measurable silica exposure in the production areas. Without any measurable exposure, there can be no health risks. There was minimal silica exposure in the mixing and crushing areas. Nonetheless, the exposure was less than 10% of the permissible exposure levels established by the Occupational Safety and Health Administration (hereinafter "OSHA"). In addition,

the employees in these areas wore respirators, which reduced their exposure by a factor of 10. With respect to respirable dusts, most of the employees had exposure which was 6% of the permissible exposure level. The worst case of exposure was only 30% of the permissible exposure level established by OSHA. Dr. Stobbe explained that these small percentages pose essentially zero risk of resulting in a respiratory disease. In fact, the studies at the Employer were comparable to the ambient air concentrations in Denver, Philadelphia, St. Louis, Washington, Cincinnati and Chicago as measured by the Environmental Protection Agency (hereinafter "EPA") and samples taken in Morgantown, West Virginia. Dr. Stobbe asserted that these studies demonstrate that the dust concentrations in the Employer's plant were very similar to the respirable dust found in cities in the United States, including Morgantown.

In conclusion, Dr. Stobbe found no detectable silica exposure in production areas. Therefore, there were no health risks in those areas. He found minimal silica exposure in the mixing room but the exposure was so low so as to pose a negligible health risk. The exposure to respirable dust was a very small percentage of the federal workplace exposure standards and is very similar to the air samples in several U. S. cities. Based on this data, Dr. Stobbe concluded that the Claimant has essentially zero probability of developing a respiratory disease as a result of his work with the Employer. Appendix 2.

In his deposition, Dr. Stobbe expounded on his conclusions. Dr. Stobbe explained that he reviewed the air sampling studies performed at the Fenton plant between 1977 and the 1990s. While he could not personally vouch for the reliability of the previous air studies, absent evidence to the contrary, he premised his opinions on the belief that the studies utilized whatever method the report indicates was employed. Dr. Stobbe explained that while his testing only reflects the air quality on the dates of the sampling, if the

production processes are essentially the same, then the levels obtained on any given day will be reflective to the point that the processes remained unchanged. With respect to the respirable dust samples, he found nothing to indicate a significant difference in the picture of the work environment at the Employer's facility in the past. He specifically stated that the asbestos studies would be accurate from November 1998 forward, and backwards in time to the time that asbestos was no longer being utilized in the plant. Appendix 3 and 7.

Dr. Stobbe emphasized that one cannot identify asbestos visibly and that just because an individual stated that he was exposed to asbestos doesn't mean that he was. He asserted that he has worked around asbestos for a number of years and he cannot be certain a substance is asbestos without laboratory analysis. He doubted that a lay person could do so. He indicated that the testimony of the claimants did not cause him to change his conclusions because that testimony relates to the individual's perception of the dust in the air. Yet, as Dr. Stobbe explained, there is dust everywhere. The amount of dust in the air is not particularly significant. He stressed that the question is not whether there is dust in the air in the plant at Fenton but whether the atmosphere at Fenton is hazardous from a legal standpoint to the individual's health. Based upon his industrial hygiene studies, his personal inspection of the plant, and his review of air sampling studies dating from 1977, the air quality at the Employer's facility did not constitute a hazardous work environment. Appendix 3.

Dr. McGraw, while conducting no air sampling, inspected the Employer's Williamstown facility and reviewed the testing administered between 1977 and the 1990s in addition to Dr. Stobbe's testing. These studies revealed results below OSHA and American Conference of Governmental Industrial Hygiene (hereinafter "ACGIH") standards. In fact,

he echoed Dr. Stobbe's testimony that the air quality in the Williamstown facility is at essentially ambient levels similar to those working in Weston, West Virginia. The air sampling studies, which measure minute levels of dust, performed over a period of time, in conjunction with his personal observation of the site, provide an ample scientific basis to conclude that the Williamstown facility is a safe and healthful workplace. He found no evidence of a respirable dust hazard or other risk of occupational pneumoconiosis. Appendix 4.

At his deposition, Dr. McGraw explained that in addition to being a physician, he has training in industrial hygiene and is the manager of the occupational medicine clinic at the University of Pittsburgh. His composite of training and experience, his specific understanding of the workplace, the health and safety of workplaces, and the potential for hazards, in combination with the air sampling measurements, provide him a unique perspective of the Employer's work environment. He agreed with Dr. Stobbe that an individual cannot determine, with certainty, that a substance is asbestos without laboratory analysis. Thus, while he, as an expert, may suspect that a substance is asbestos, he always relies on the laboratory analysis for confirmation. He further agreed that particles which can be seen are too large to be inhaled. He cautioned that "just because you can see it, doesn't mean you are being exposed to potentially harmful materials." Appendix 5 at 45.

Dr. McGraw readily conceded that he was not present during any of the air sampling studies. Nonetheless, absent evidence to the contrary, he assumed that the studies were done under appropriate industrial hygiene standards. He averred that in practice, one must rely on the professionalism of other professionals. He regularly renders opinions of what has transpired before his observations. That, he explained, is part of epidemiology. His

access to data from 1977 encompasses a far better appreciation for the place and people and enables him to extend his observational powers over a longer period of time. He testified that it was an inappropriate generalization to assert that one cannot rely on others' work. "We all rely upon information from others, otherwise we wouldn't be able to live in a society. And, if we're professionals we have to rely upon other professionals, their judgments, their writing, their literature, and all of their other work products." Id. at 62.

Dr. McGraw explained that he is able to draw conclusions regarding the air quality of the Employer's plant based upon the information made available to him. He indicated that his ability to inspect the plant is crucial. The observations obtained during that inspection represent the conditions in existence for some time prior to his inspection. Moreover, he had access to studies taken over a period of time, which are consistent. Thus, there are 2 "data sets" (the one obtained between 1977 and the 1990s and the other by Dr. Stobbe), which when joined together, can be reflective of the prior exposure at that facility. His inspection of the plant in 2000 represents a continuum of the standard of safety at the Employer's facility. The facility cannot be "horribly dusty" one day and very clean the next. "It doesn't work that way." Here, he had access to 23 to 24 years of monitoring, which demonstrate that the level of cleanliness and safety had to be installed for some prior period of time in order to be at the level he observed. He explained that "[i]t would not be feasible, practical or otherwise possible for that to have happened within a short period of time. And so, my reflections reflect not just one day, but over, I think a much longer period of time. That's why visits are – can be useful above and beyond the very brief time period that you're there." Appendix 5 at 34-36.

The Employer's Safety Director, Michael Fenton, completed an affidavit on November 22, 2000. He attested that he has worked at the Williamstown plant since 1972 and has served as its safety director since 1985. Mr. Fenton asserted that an industrial hygiene program was instituted in 1963 with periodic air sampling beginning in 1977. The Employer began abolishing possible sources of asbestos fibers during the mid-1980s, completing that process by November 1989. He further attested that since the beginning of the air monitoring in 1977, there have been no changes made in the operation, production or use of equipment to increase the risk of exposure to hazardous dust. Appendix 6.

The consolidated record contains a summary of air sampling studies performed at the Employer's plant beginning in 1977. Drs. Stobbe and McGraw have testified that these studies indicate that the exposure to asbestos, silica and other respirable dust was below the permissible exposure levels set by OSHA and/or ACGIH. Appendix 3, 5 and 7.

Three members of the OP Board, Drs. James Walker, Jack Kinder and Thomas Hayes, testified at the *Fraga* hearing on May 21, 2003. They reviewed the evidence of record and agreed that the Claimant had no exposure to asbestos after November 1989 when the Employer's abatement program was completed. They further agreed that dust must be inhaled into the lungs before it can affect lung function and that one cannot identify asbestos, with certainty, by a visual inspection. Dr. Walker could not comment regarding the extent of respirable dust prior to Dr. Stobbe's studies because he did not review the actual air samples taken from 1977 until the 1990s. Nonetheless, he did admit that the studies show that, in general, the respirable dust levels were sufficiently low to represent no harmful exposure, although one must take into account the individual's susceptibility. This susceptibility, however, would be evidenced by clinical manifestations such as x-ray or

ventilatory changes. Dr. Walker emphasized, however, that he has "been more impressed by other problems causing respiratory symptoms." In this case, the Claimant was granted no award, in part, because his x-ray is negative for occupational pneumoconiosis. Appendix 9.

Dr. Walker further stated that a facility cannot greatly improve its air quality on any given day, just because industrial hygiene sampling is being undertaken. He further agreed that the Williamstown facility appeared to be operating at normal capacity during the visits by Drs. Stobbe and McGraw, who indicated that no department was shut down on the days of the testing or inspection. He stated that if one assumed that the testing was valid back to 1977, then the studies would reflect the air quality in 1977. He asserted that there is no evidence in the record to suggest that the air sampling performed since 1977 was invalid.

Drs. Kinder and Hayes echoed Dr. Walker's testimony. These physicians testified that the record establishes that the Claimant had no exposure to asbestos after November 1989. They also agreed that the earlier air quality studies indicate that the exposure to asbestos and respirable dust falls below the permissible exposure levels recommended by OSHA. Appendix 9.

The non-medical order was submitted for decision after the *Fraga* hearing. In a Decision dated September 4, 2003, Judge Haslebacher affirmed the non-medical order, finding that the Claimant's employment at a glass factory created an image of exposure to the hazards of occupational pneumoconiosis, which had not been refuted by the Employer. Appendix 10.

Upon resolution of the medical issue, the Employer appealed the Judge's Decision to the Board of Review. In an Order dated May 30, 2006, the Board summarily affirmed the Judge's Decision on this issue. Appendix 15.

Evidence relative to the medical issue:

The Claimant filed the instant claim, accompanied by a WC-205, completed by Dr. Hortensia Fernandez on October 8, 1997. She noted the Claimant's complaints of shortness of breath and cough. Dr. Fernandez heard suppressed breath sounds on physical examination. She made a diagnosis of occupational pneumoconiosis.

Attached to the WC-205 was the September 2, 1997 report of Dr. Maurice Bassali. Dr. Bassali read the July 29, 1997 x-ray as revealing pneumoconiosis 1/1 q/t with bilateral Grade B pleural thickening. Appendix 16.

The Claimant was examined by the members of the OP Board, comprised of Drs. Walker, Hayes and Bradley Henry, on April 21, 1998. The OP Board noted the Claimant's complaints of shortness of breath and a cough. The Board heard wheezing on physical examination, which persisted after exercise. The x-ray was negative for occupational pneumoconiosis but did reveal subpleural fat. The OP Board's pulmonary function study revealed an obstructive impairment. Following its evaluation, the OP Board concluded that there was insufficient evidence to support a finding of occupational pneumoconiosis. Appendix 11.

In accordance with the Board's findings, the Division granted the Claimant no award by Order dated June 18, 1998. Appendix 12.

In support of his protest, the Claimant introduced an August 18, 1998 report of Dr. Dominic Gaziano. He read the OP Board's x-ray as revealing a 1/0 q/t pneumoconiosis with no pleural changes. Appendix 17.

The Claimant also introduced a September 4, 1998 report of Edward Aycoth, who read the OP Board's film as revealing a 1/0 p/p pneumoconiosis with bilateral Grade A pleural thickening. Appendix 18.

The Employer introduced the August 7, 2000 report of Dr. John Willis. Dr. Willis reviewed the OP Board's x-rays as well as the 1997 films read by Dr. Bassali. Dr. Willis reported that none of these films show changes of occupational pneumoconiosis or any pleural changes. He did find evidence of subpleural fat. Appendix 19.

The Employer also introduced the August 7, 2000 report of Dr. James T. Smith. Dr. Smith read the same x-rays as did Dr. Willis. While there is evidence of subpleural fat, he found no pleural or parenchymal evidence of occupational pneumoconiosis. Appendix 20.

The August 23, 2000 report of Dr. David Sparks was also introduced into the record. He reviewed the same x-rays as did Dr. Willis and Dr. Smith. He found that none of the x-rays reveal pleural or parenchymal evidence of occupational pneumoconiosis. He did describe subpleural fat. Appendix 21.

A final OP Board hearing was conducted on November 10, 2004. Drs. Walker, Kinder and J. L. Leef were presented for cross-examination. Dr. Leef testified that he had on the view box for review the x-rays read by Drs. Willis, Sparks and Smith. These x-rays reveal changes of subpleural fat. He testified that there was an advantage in reviewing a series of x-rays on one patient. He asserted that he did not find the reports of Drs. Bassali,

Gaziano and Aycoth to be reliable because he could not see the changes they described, which should have been readily apparent, particularly those described by Dr. Bassali. Moreover, none of the other OP Board members or three other B readers/radiologists could find the changes, either. Dr. Leef made a specific finding that the x-rays are negative for occupational pneumoconiosis. Appendix 13.

Drs. Walker and Kinder testified that they agreed with Dr. Leef that the x-rays are negative for occupational pneumoconiosis. Further, they attributed the Claimant's respiratory impairment to non-occupational bronchospastic disease. Id.

Following the OP Board's testimony, the protests were submitted for decision. Judge Haslebacher issued a Decision on December 15, 2004 affirming the insufficient evidence ruling. He observed that all of the members of the OP Board, in addition to Dr. Willis, Dr. Sparks, and Dr. Smith, found no evidence of occupational pneumoconiosis. He pointed out that although Drs. Bassali, Gaziano and Aycoth did find changes consistent with occupational pneumoconiosis, the physicians could not agree as to the profusion of the x-ray changes or the type of the opacities seen. Further, the pleural changes which they described were due to subpleural fat. Judge Haslebacher held that "one only wonders if they were actually looking at the same individual." Appendix 14 at 4. Because of the deficiencies in their reports, Judge Haslebacher specifically found that the reports of Drs. Gaziano, Bassali and Aycoth to be unreliable. On the other hand, the Judge found the testimony of the OP Board and the reports of Drs. Willis, Smith and Sparks to be reliable. Finding no x-ray evidence of occupational pneumoconiosis and no evidence of any pulmonary impairment due to the Claimant's occupational exposure, Judge Haslebacher affirmed the insufficient evidence ruling. Id.

The Claimant appealed the Judge's Decision on the medical issue and the Employer appealed his Decision on the non-medical issue to the Board of Review. The Board of Review summarily affirmed the Judge's Decision on the non-medical issue. Appendix 15.

The Board, however, found that there is a medical difference of opinion as to the existence of occupational pneumoconiosis. Finding that there is reliable evidence to establish the existence of occupational pneumoconiosis, two members of the Board of Review voted to reverse the Division's Order, the OP Board's findings, and the Judge's Decision and to grant the Claimant a 5% permanent partial disability award. Appendix 15.

Judge Rita Hedrick-Helmick dissented from the Board's order. She denoted the Board's statutorily imposed duty to affirm the Judge's Decision if it is supported by the reliable, probative and substantial evidence of record. Finding nothing in the record to show that the OP Board and the Judge were clearly wrong, she voted to affirm the Judge's Decision on the medical issue. Id.

This proceeding stems from the Employer's petition for appeal from the May 30, 2006 Order of the Board of Review.

### III. ISSUES PRESENTED

1. WHETHER THE ADMINISTRATIVE LAW JUDGE EXCEEDED HIS AUTHORITY BY CREATING A PRESUMPTION OF EXPOSURE AND IMPROPERLY SHIFTING THE BURDEN OF PROOF TO THE EMPLOYER TO REBUT THAT PRESUMPTION?
2. WHETHER THE ADMINISTRATIVE LAW JUDGE UTILIZED THE CORRECT LEGAL STANDARD?

3. WHETHER THE ADMINISTRATIVE LAW JUDGE ERRED BY REJECTING THE OPINIONS OF DRS. STOBBE AND MCGRAW BECAUSE THE ACTUAL DUST SAMPLING STUDIES ARE NOT OF RECORD?
4. WHETHER THE ADMINISTRATIVE LAW JUDGE'S "WEIGHING" OF THE EVIDENCE COMPORTS WITH THE APPLICABLE LAW?
5. WHETHER THE BOARD OF REVIEW EXCEEDED ITS SCOPE OF REVIEW BY REVIEWING THE EVIDENCE *DE NOVO* AND CONCLUDING THAT THE CLAIMANT IS ENTITLED TO A 5% AWARD?

#### IV. POINTS AND AUTHORITIES RELIED UPON

1. The burden of establishing a claim for Workers' Compensation benefits rests upon the person who asserts it. Sowder v. State Workmen's Compensation Commissioner, 155 W. Va. 889, 189 S.E.2d 674 (1972); Eady v. State Workmen's Compensation Commissioner, 148 W. Va. 5, 132 S.E.2d 883 (1966).
2. The rule of liberality dictates that the Claimant be given the benefit of all reasonable inferences the record will admit to him but does not take the place of proper proof. Myers v. State Workmen's Compensation Commissioner, 239 S.E.2d 124 (W. Va. 1977), Linville v. State Workmen's Compensation Commissioner, 236 S.E.2d 41 (W. Va. 1977), Smith v. State Workmen's Compensation Commissioner, 155 W. Va. 883, 189 S.E.2d 838 (1972), Staubs v. State Workmen's Compensation Commissioner, 153 W. Va. 337, 168 S.E.2d 730 (1969).
3. The Commissioner is not bound by the conclusions stated in a single physician's report but must make an independent determination based upon all of the evidence in the claim. Haines v. State Workmen's Compensation Commissioner, 151 W. Va. 152, 150 S.E.2d 883 (1966), Burgess v. State Worker's Compensation Commissioner, 16337 (W. Va. March 15, 1985) (per curiam).
4. The Appeal Board must affirm an administrative law judge's decision unless it is not based upon the reliable, probative and substantial evidence based upon the whole record. Conley v. Workers' Compensation Division and Hercules, Inc., 43 S.E.2d 542 (W. Va. 1997).

#### IV. ARGUMENT

This Honorable Court has consistently held that the burden of establishing a claim for workers' compensation benefits rests upon the person who asserts it. Sowder v. State Workmen's Compensation Commissioner, 155 W. Va. 889, 189 S.E.2d 674 (1972); Clark v. State Workmen's Compensation Commissioner, 155 W. Va. 726, 187 S.E.2d 213 (1972). The difficulty in interpreting the evidence lies in the interrelationship between the claimant's burden of proof and the "rule of liberality." The Court has held that the "spirit of liberality" dictates that the claimant be given the benefit of all reasonable inferences the record will admit favorable to him. Myers v. State Workmen's Compensation Commissioner, 239 S.E.2d 124, 126 (W. Va. 1977). The "rule of liberality," however, was never intended to, and does not take the place of, proper proof. Linville v. State Workmen's Compensation Commissioner, 236 S.E.2d 41 (W. Va. 1977) (emphasis added); Smith v. State Workmen's Compensation Commissioner, 155 W. Va. 883, 189 S.E.2d 838 (1972); Staubs v. State Workmen's Compensation Commissioner, 153 W. Va. 337, 168 S.E.2d 730 (1969). In Linville, the Court stated that "[t]he general rule in workmen's compensation cases is that the evidence will be construed liberally in favor of the claimant, but the rule does not relieve the claimant of the burden of proving his claim by proper and satisfactory proof." 236 S.E.2d at 44 (emphasis added).

The Court has also consistently held that the evidence when considered as a whole, must be sufficient to "make a reasonable person conclude that the claimant has established his claim." Eady v. State Workmen's Compensation Commissioner, 148 W. Va. 5, 132 S.E.2d 642 (1963). Furthermore, it must be remembered that the Commissioner is not bound by the conclusions stated in a single physician's report, but rather

must make an independent determination based upon all of the evidence in the claim. Haines v. State Workmen's Compensation Commissioner, 151 W. Va. 152, 150 S.E.2d 883 (1966). See also, Burgess v. State Workers' Compensation Commissioner, 16337 (W. Va. March 15, 1985) (per curium).

Under the statute, the Appeal Board (now called the Board of Review) must reverse the decision of an administrative law judge if, *inter alia*, the judge's decision is clearly wrong in light of the reliable, probative, and substantial evidence based upon the whole record. W.V. Code § 23-5-12(b)(5)(1995). In the instant case, the Board of Review erred in affirming the Judge's Decision on the non-medical issue as it is contrary to the applicable law. The Board further erred in reversing the Judge's Decision on the medical issue as his Decision is supported by the reliable, probative and substantial evidence of record.

This Court's standard of review is limited on appeal. On appeal, this Honorable Court is charged with the responsibility of determining whether the Board of Review properly adhered to its standard of review. This Court will not disturb the findings of the Board of Review *unless* the Board did not adhere to its statutorily-imposed standard of review of insuring that the judge's decision is based upon the reliable, probative and substantial evidence when viewed as a whole. Conley, 483 S.E.2d at 549. In the instant case, the Order of the Board of Review is contrary to the applicable law and, therefore, must be reversed.

1. THE ADMINISTRATIVE LAW JUDGE EXCEEDED HIS AUTHORITY BY CREATING A PRESUMPTION OF EXPOSURE AND IMPROPERLY SHIFTING THE BURDEN OF PROOF TO THE EMPLOYER TO REBUT THAT PRESUMPTION.

The Employer protested the non-medical issue because it maintained that the Claimant was not exposed to abnormal quantities of hazardous dust during his employment with the Employer. In support of its position, the Employer introduced the reports and/or testimony of two industrial hygiene specialists, which unequivocally established that the Claimant was not so exposed.

Yet, when resolving this question, the Judge held that “[g]lass factory employment is of the type which gives rise to an image of exposure to dust. There is no factual evidence, prior to November 1998, to refute this image.” Appendix 10 at 6. The Judge exceeded his authority as the trier-of-fact by (1) creating a presumption that certain types of employment entail exposure to abnormal quantities of dust and (2) shifting the burden of proof to the Employer to rebut this improperly created presumption.

Under W. Va. Code § 23-4-1, the Claimant must establish two elements in order to be found entitled to occupational pneumoconiosis benefits. This section has been interpreted to require *the Claimant to prove* that (1) he has the disease and (2) that he was exposed to the hazards of the disease in the state of West Virginia. See W. Va. Code § 23-4-1 (2002); Maynard v. State Workmen’s Compensation Comm’r, 161 W. Va. 21, 239 S.E.2d 504 (1977). As the proponent of the ruling in this claim, it is the Claimant who bears the burden of proof. See generally Sowder, 189 S.E. 2d at 674. Significantly, the statute does not contain a presumption that an employee of any particular industry is presumed to be

exposed to the hazards of the disease. Once the Claimant establishes this element, the burden of persuasion shifts to the Employer to disprove the existence of an exposure to the hazards of occupational pneumoconiosis.

In this case, however, the Judge improperly created such a presumption for this Claimant. He held that work in a glass factory gives rise to an image of exposure to dust. Appendix 10 at 6. In creating this presumption, he improperly relieved the Claimant of his statutorily imposed duty to *demonstrate* that he was exposed to the hazards of occupational pneumoconiosis and instead shifted the burden of proof to the Employer to provide "factual evidence ... to refute this image." Appendix 10. The Judge was not vested with the authority to create presumptions, particularly as they relate to eligibility to benefits. Therefore, his creation of a presumption of exposure to the hazards of occupational pneumoconiosis in glass factory employees is clearly contrary to the applicable law.

Because the Judge's Decision is contrary to the applicable law, the Board of Review erred by failing to reverse or vacate his Decision.

2. THE ADMINISTRATIVE LAW JUDGE UTILIZED THE INCORRECT LEGAL STANDARD IN RESOLVING THE NON-MEDICAL ISSUE.

In addition to improperly creating a presumption of exposure to the hazards of occupational pneumoconiosis, the Judge compounded his error by utilizing the incorrect legal standard in resolving this issue. The Judge limited his "analysis" of this question to whether the Claimant was exposed to dust. Appendix 10 at 3-6. That is incorrect. The issue is not

whether the Claimant was exposed to dust but whether he was exposed to dust *in abnormal quantities* to constitute an occupational hazard.

Occupational pneumoconiosis is defined as a "disease of the lung 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." W.Va. Code §23-4-1. This Court has held that a "hazard" is "any condition where it can be demonstrated that there are minute particles of dust *in abnormal quantities in the work area.*" Meadows v. Workmen's Compensation Comm'r., 157 W.Va. 140, 198 S.E.2d 137, 145 (1973). Drs. Stobbe and McGraw explained that the mere exposure to dust is not sufficient to demonstrate a hazardous work environment. In fact, the experts testified that if one can see the dust particles, they are usually too large to be inhaled into the lungs. If the dust particles are not inhaled, they cannot constitute a health risk.

There is no evidence that the Claimant was exposed to *abnormal quantities* of dust during his employment with the Employer. Dr. Stobbe reported, and later testified, that he performed air quality testing in 1998 and 1999. Dr. Stobbe emphasized that the mere presence of dust is not determinative because there is dust everywhere. Instead, the question is whether the atmosphere at the Employer's facility is a hazard from a legal standpoint to the individual's health. In this case, Dr. Stobbe's testing demonstrated that there was no asbestos found in six departments of the plant. There was no detectable silica in the production areas with only minimal silica exposure in the mixing department. This exposure was less than 10% of the permissible exposure levels and the employees in this department wore respirators, which reduced their exposure by a factor of 10. In addition, there was

minimal exposure to respirable dust as the exposure level for most employees was only 6% of the federal standards. Appendix 2.

Dr. Stobbe found that no personnel or job exceeded the OSHA exposure standards. In fact, with these measurements, the work environment at the Employer's plant was essentially the same as the ambient air in several U. S. cities, including Morgantown, West Virginia. Based upon his studies and the other information made available to him, Dr. Stobbe concluded that these exposure levels present zero risk of resulting in a respiratory disease.

In his depositions, Dr. Stobbe re-iterated that his opinion is premised upon his own testing at the Williamstown facility as well as his review of the air quality samples dating from 1977. Comparing these earlier test results with his own studies, Dr. Stobbe found that there were no significant differences in the picture of the work environment at Fenton. He stressed that based upon the earlier studies and his own testing, the work environment at Fenton was not hazardous to the employees' health. Appendix 3 and 7.

Dr. Stobbe's opinion is corroborated by that of Dr. McGraw. Dr. McGraw predicated his opinion upon the air quality testing performed between 1977 and the early 1990s and Dr. Stobbe's studies, as well as his personal inspection of the Williamstown facility. The studies consistently demonstrate that the exposure levels are well below OSHA and ACGIH standards. He agreed with Dr. Stobbe that the work environment at Fenton is essentially similar to the ambient air in several U. S. cities, including Weston, West Virginia. His review of air quality studies over a 23 to 24 year period of time, coupled with his personal observations at the facility, provide a scientific basis to conclude that the Employer

has a safe and healthful work environment. He found no evidence of a respirable dust hazard or other risk of occupational pneumoconiosis.<sup>3</sup>

These experts' opinions stand unrefuted. The Claimant has not introduced a single expert opinion to establish that the work environment at the Employer's facility contained an *abnormal quantity of dust*. The *only* evidence introduced by the Claimant on this question was his self-serving testimony that he was exposed to dust. Appendix 8 at 4-5 and 12-13. This is wholly inadequate. As the *experts* explained, just because dust can be seen doesn't mean that the individual is exposed to a dust hazard. Both Dr. Stobbe and Dr. McGraw testified that lung function can only be affected when minute particles of dust are inhaled into the lungs. Dust particles that can be seen are too large to be inhaled. Rather, they are trapped in the upper airways and are expelled by coughing. Appendix 3, 5 and 7. Thus, the fact that the Claimant could *see* the dust particles does not establish that he was exposed to a dust hazard. In fact, it establishes the converse. The fact that he could see the dust particles demonstrates that they were not minute and therefore, were not inhaled into the

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<sup>3</sup>While the Claimant contends that the opinions of Drs. Stobbe and McGraw are suspect because they were not present when the air quality studies were administered beginning in 1977, that contention is unfounded. Although Dr. Stobbe stated that he could not personally vouch for the reliability of the earlier studies, he testified that he utilized those studies, absent proof that the studies were improperly performed, of which he found none. Appendix 3 and 7.

Dr. McGraw expounded on that position. Absent evidence to the contrary, he assumed that the studies were done under appropriate industrial hygiene standards. He averred that in practice, one must rely on the professionalism of other professionals. He regularly renders opinions of what has transpired before his observations, which is a part of epidemiology. He testified that it was an inappropriate generalization to assert that one cannot rely on others' work. "We all rely upon information from others, otherwise we wouldn't be able to live in a society. And, if we're professionals we have to rely upon other professionals, their judgments, their writing, their literature, and all of their other work products." Appendix 5 at 62.

lungs. Absent the dust particles being inhaled into the lungs, there is no risk for developing an occupational lung disease.

The Claimant testified that he has worked for the Employer between 1953 and 1997, during which time he alleges that he was exposed to dust and asbestos. Appendix 8. Drs. Stobbe and McGraw reported, and later testified, that periodic air quality samples were obtained since 1977, which established that the dust exposure was below OSHA and ACGIH standards. Appendix 2-5 and 7. The Employer's Safety Director attested that there has been no change in the production processes since 1977 which would increase the risk of exposure to hazardous dust. Appendix 6. Dr. Stobbe testified that his studies, when compared to those administered since 1977, demonstrate no substantial differences in the air quality at the Williamstown facility. Appendix 3 and 7. Dr. McGraw explained that these 2 "data sets," when joined together, can be reflective of the prior exposure at that facility. His inspection of the plant in 2000 represents a continuum of the standard of safety at the Employer's facility. The facility cannot be "horribly dusty" one day and very clean the next. "It doesn't work that way." Dr. McGraw found that the 23 to 24 years of monitoring demonstrate a level of cleanliness and safety which had to have been installed for some prior period of time in order to be at the level he observed. He explained that "[i]t would not be feasible, practical or otherwise possible for that to have happened within a short period of time. And so, my reflections reflect not just one day, but over, I think a much longer period of time. That's why visits are – can be useful above and beyond the very brief time period that you're there." Appendix 5 at 35-36.

The Judge pointed out that the OP Board could not exclude the possibility that the Claimant had been exposed to dust during his employment with the Employer. Appendix

10. That testimony, however, is not determinative of the issue in this case. The issue is not whether the Claimant was exposed to dust; the issue is whether the Claimant has been exposed to dust *in abnormal quantities*. Here, 23 to 24 years of air quality studies, which are presumed to be valid as there has been no evidence introduced to the contrary, establish that the levels of respirable dusts were far below the permissible exposure levels established by OSHA and ACGIH. Dr. Stobbe testified that exposure levels this low present a zero probability that the Claimant would suffer a health risk as a result thereof. Appendix 3 and 7.

This is borne out by the fact that the OP Board found insufficient evidence to support a diagnosis of occupational pneumoconiosis in this case. The Claimant's x-ray was read by the OP Board as negative for occupational pneumoconiosis. Appendix 11 and 13.

In summary, while the Claimant may have been exposed to dust during his employment with the Employer, that fact alone does not render the Employer a chargeable employer for purposes of this occupational pneumoconiosis claim. The experts agree that there is dust everywhere. The evidence is, however, essentially uncontroverted that the Claimant was not exposed to *abnormal quantities* of dust during his tenure with the Employer. Rather, any exposure to dust which the Claimant may have experienced at the Williamstown plant was well below the permissible exposure levels established by OSHA and/or ACGIH. The experts further agree that the dust levels at which the Claimant was exposed present a zero risk of the Claimant developing an occupational lung disease.

Because the Claimant was not exposed to the *hazards*, as that term is defined in the statute and case law, of occupational pneumoconiosis during his employment with the Employer, the Employer should have been dismissed as a chargeable employer in this claim

pursuant to W. Va. Code § 23-4-1 and this Court's holding in Meadows. As the Judge's Decision is not consistent with the statute or case law, his Decision should have been reversed by the Board of Review.

In the alternative, the non-medical order should be modified to change the date of last exposure to a date preceding the first periodic air monitoring of the dust levels at the Employer's plant. The Employer's Safety Director attested that air quality testing was initiated at the Williamstown facility on September 28, 1977. Appendix 6. Drs. Stobbe and McGraw testified that the air quality studies beginning in 1977 demonstrate that the exposure levels at the Employer's facility were below the permissible exposure levels established by OSHA and/or ACGIH. Appendix 3, 5 and 7. The members of the OP Board agreed that these studies, if valid, demonstrate that the dust levels were below the permissible exposure levels. Appendix 9. The Employer's Safety Director further attested that "since the date air monitoring began in 1977 there had been no change in operation, production procedures, or use of the equipment and materials which have increased employees' risk of exposure to hazardous dust in the facility." Appendix 6 at 2. Because the Claimant was not exposed to a dust hazard since 1977, the date of last exposure must be modified to a date preceding the commencement of air quality studies in 1977.

Because the Judge used the incorrect legal standard to resolve the non-medical issue, the Board of Review's Order must be reversed and the Judge's Decision vacated.

3. THE ADMINISTRATIVE LAW JUDGE ERRED IN REJECTING THE OPINIONS OF DRs. STOBBE AND MCGRAW BECAUSE THE ACTUAL AIR SAMPLING STUDIES ARE NOT OF RECORD.

The Judge held that the opinions of Drs. Stobbe and McGraw *must* be found to be unreliable because the actual air sampling studies from 1977 were not introduced into the record. He reasoned, therefore, that there was no way to verify the conclusions of Drs. Stobbe and McGraw who had read the surveys. Appendix 10 at 5. This finding is irrational and must be vacated.

While it is true that the results of the actual air sampling studies dating from 1977 were not introduced into the record, a summary of that data was admitted in the consolidated claim. In fact, the OP Board testified that it reviewed that summary in anticipation of the *Fraga* hearing. Appendix 9. During the litigation of this claim, an objection was not made by any party regarding the absence of the actual air sampling studies in the record.

The Judge's finding is particularly irrational because the presence of the air sampling studies would not have substantially altered the record because there is no one at the *Fraga* hearing or during the decision making process who could have verified the conclusions of Drs. McGraw and Stobbe. The Judge has no expertise to interpret air sampling data to determine whether those results verify the findings reached by Drs. Stobbe and McGraw.

Similarly, the members of the OP Board have not been qualified as industrial hygiene specialists. The statute mandates that the OP Board be comprised of physicians with expertise in pulmonary diseases, with two of them being roentgenologists. It has not been

shown that any of them have expertise in industrial hygiene. As such, they lack the demonstrated expertise to independently interpret the air sampling data to verify the conclusions reached by Drs. Stobbe and McGraw.

The Judge properly found that Drs. McGraw and Stobbe read the prior air sampling data. Both experts were exhaustively cross-examined regarding their conclusions. If the Claimant questioned whether their conclusions were supported by the prior air sampling data, it was incumbent upon him to introduce his own expert opinion on this issue. He did not do so. As the record now stands, the conclusions of Drs. Stobbe and McGraw are uncontradicted. Consequently, the Judge rejected their opinions for an improper reason.

In light of the uncontradicted testimony of Drs. Stobbe and McGraw, the Board of Review should have reversed the Judge's Decision as the experts' opinions unequivocally demonstrate that the Claimant was not exposed to abnormal quantities of dust during his employment with the Employer.

4. THE ADMINISTRATIVE LAW JUDGE'S WEIGHING OF THE EVIDENCE DOES NOT COMPORT WITH THE APPLICABLE LAW.

In his weighing of the evidence of record, the Judge committed several errors, which mandate the vacation of his Decision.

A. The Judge erred in finding that there is no actual data to indicate that the Claimant was not exposed to a dust hazard.

The Judge made several "findings" regarding the existence of any evidence to establish that the Claimant was not exposed to the hazards of occupational pneumoconiosis. More specifically, he stated that Dr. Walker found that there is no evidence as to the status

of the air quality at the Employer's plant five, ten or twenty years previous. Appendix 10 at 5. Later, he pointed to Dr. Hayes' statement that there is no air quality sampling regarding asbestos prior to 1989. *Id.* at 6. He also found that there was no actual data other than Dr. Stobbe's testing as to the presence or absence of dust and asbestos. *Id.* The problem with these findings is that they are unsupported by the evidence of record.

Drs. Stobbe and McGraw reported that they reviewed the air sampling data dating from 1977. They integrated that evidence into their own air quality testing and/or analysis of the Employer's plant. They testified extensively regarding those findings, both in a general deposition in the consolidated claim and/or in a deposition in this particular claim. The testimony of these two industrial hygiene specialists, the only two experts to review the prior air sampling data, asserted that there is a continuum of safety demonstrated by more than 20 years of air sampling studies, which is well below standards established by OSHA and ACGIH.

Because there *is* evidence in the record, which affirmatively demonstrates that the Claimant was not exposed to the hazards of occupational pneumoconiosis while in the Employer's employ, the Judge's Decision must be vacated as unsupported by the evidence of record.

**B. The Judge erred in finding that the Claimant's employment predated the industrial hygiene studies.**

The Judge held that the Claimant's employment took place before the air sampling studies administered by Dr. Stobbe. Appendix 10 at 6. While this is technically true, the Judge's finding does not accurately reflect the record as it also contains evidence relative to air quality studies administered prior to the first survey by Dr. Stobbe.

It is undisputed that the Employer initiated air quality studies beginning in 1977. The record also establishes, through the affidavit of the Employer's Safety Director, that the processes at the plant have not substantially changed since 1977. Appendix 6. The industrial hygiene specialists testified that if the manufacturing processes have remained unchanged since 1977, the air quality studies commencing in 1977 would reflect that work environment at the plant. Both Dr. McGraw and Dr. Stobbe testified that the air quality studies, *in toto*, demonstrate that the Claimant was not exposed to a dust hazard during his employment at the Employer. Appendix 3, 5 and 7.

Because the record establishes that the Claimant was employed at the Employer during the administration of air quality studies administered since 1977, the Judge's credibility determination is not supported by the evidence of record.

C. The Judge failed to cite any basis for his credibility determinations.

In resolving the conflicting evidence, the Judge accorded determinative weight to the opinion of Dr. Walker and the other members of the OP Board. While the statute provides that the OP Board is to decide all *medical* questions relating to occupational pneumoconiosis, its finding is not determinative of the non-medical issue. In fact, this Court has held that the testimony of the OP Board constitutes one opinion, which must be weighed against the other evidence of record. Rhodes v. Workers' Compensation Division, 209 W. Va. 8, 543 S.E. 2d 289 (2000).

In this case, there is no warrant in the record for according determinative weight to the OP Board's testimony on this issue. The OP Board admitted that it had not reviewed the actual air quality studies dating from 1977. Drs. Stobbe and McGraw did. The

OP Board has not been certified as industrial hygiene specialists. Drs. Stobbe and McGraw have. The OP Board did not inspect the Employer's facility. Drs. Stobbe and McGraw did.

While the Judge said that the only reasonable conclusion is that "it cannot be said that the Claimant was not exposed to the hazards of abnormal quantities of dust in the course of and resulting from this employment" (Appendix 10 at 6), the Employer submits that the Judge reached the only unreasonable conclusion based upon the existing record.

The Judge rejected the opinions of the only qualified industrial hygiene specialists, who reviewed 24 years of dust sampling and personally inspected the Employer's facility, in favor of the testimony of the OP Board, who admitted that it did not see the actual dust sampling or inspect the Employer's premises and have not been qualified as industrial hygiene specialists. Because this credibility determination does not comport with the evidence of record, his Decision must be vacated.

Even if the Judge's decision to accord determinative weight to the OP Board's testimony is upheld, their opinion supports, rather than refutes, the Employer's position. The OP Board testified that if the air sampling dating from 1977 is valid, then those studies reflect the work environment at the plant since that time. Appendix 9 at 25. There has been absolutely no evidence introduced into the record to demonstrate that the air quality studies dating from 1977 are invalid. Those studies have been interpreted by the industrial hygiene specialists to demonstrate that the work environment at the Employer did not pose a health risk to the Claimant.

Because the Judge's credibility determinations are not supported by the evidence of record, the Judge's Decision and the Board of Review's Order must be reversed.

D. Summary

The Judge's weighing of the evidence of record does not comport with the evidence of record. He erred in according determinative weight of the testimony of the OP Board on the non-medical issue over that of the industrial hygiene specialists. He further erred in finding that all of the Claimant's employment preceded the air sampling studies. He committed further error by failing to cite the bases for his credibility determinations.

For all these reasons, the Judge's credibility determinations, and ultimately his Decision and the Order of the Board of Review, must be reversed or vacated.

5. THE BOARD OF REVIEW EXCEEDED ITS SCOPE OF REVIEW BY REVIEWING THE EVIDENCE *DE NOVO* AND CONCLUDING THAT THE CLAIMANT IS ENTITLED TO A 5% AWARD.

On the medical issue, Judge Haslebacher properly discharged his duty to weigh the conflicting evidence of record and render findings of facts regarding the reliability and credibility of the evidence. The Judge carefully considered the OP Board's testimony regarding the findings on x-ray. The Judge made a specific finding that the reports of Drs. Bassali, Aycoth and Gaziano are unreliable because they are refuted by the opinions of four members of the OP Board and three B readers/radiologists. Appendix 14.

On appeal, the Board of Review did not adhere to its scope of review. Instead of determining whether the Judge's Decision is supported by the reliable, probative and substantial evidence of record, the Board reviewed the evidence *de novo* and concluded that the Claimant had introduced reliable x-ray evidence of occupational pneumoconiosis.

Appendix 15. Because the Board did not adhere to its scope of review, its Order should be reversed.

As set out above, the Board of Review's scope of review is limited. It is not empowered to weigh the evidence *de novo*. Instead, the Board is charged with the responsibility of determining whether the Judge's Decision is supported by the reliable, probative and substantial evidence of record. Had it properly discharged its duty on appeal, the Board would have come to the inescapable conclusion that the Judge's Decision is supported by the reliable, probative and substantial evidence of record.

It is clear that the Judge's Decision is supported by substantial evidence of record. Three physicians made a diagnosis of occupational pneumoconiosis in this Claimant.

Appendix 16-18. On the other hand, all five members of the OP Board (Drs. Walker, Kinder, Henry, Hayes and Leef), as well as Drs. Willis, Sparks and Smith concluded that the x-rays are negative for occupational pneumoconiosis. Appendix 11, 13 and 19-21. Clearly, the overwhelming weight of the x-ray evidence is negative for occupational pneumoconiosis.

Contrary to the Board of Review's finding, the evidence suggesting the presence of occupational pneumoconiosis is not reliable. For example, the Judge cited Dr. Leef's testimony that he looked for the changes described by Drs. Gaziano, Ahmed and Bassali, which should have been readily apparent, but he could not find them. Moreover, Dr. Hayes stressed that no other physician could locate the changes that these physicians described. Thus, he did not consider their reports to be reliable. Appendix 13. The Judge did not err in relying upon this testimony in rejecting the Claimant's evidence.

Additionally, the Judge pointed out that Drs. Bassali, Gaziano and Aycoth did not agree as to the extent of the x-ray changes. Dr. Bassali described a 1/1 pneumoconiosis (Appendix 16) whereas Drs. Gaziano and Aycoth described a 1/0 pneumoconiosis (Appendix 17 and 18, respectively). Because the Claimant's consultants could not agree as to the extent of the x-ray changes, the Judge did not err in rejecting their opinions as unreliable.

The Judge further pointed out that the Claimant's consultants could not agree as to the size of the x-ray changes. Dr. Aycoth described the primary opacity as a "p" type (Appendix 18) whereas Drs. Bassali and Gaziano described "q" type opacities (Appendix 16-17). These opacities are different sizes. The inability of the Claimant's consultants to agree as to the size of the primary opacity is a valid reason to discredit the Claimant's evidence. Neither the Claimant nor the Board of Review has demonstrated that the Judge erred in rendering his credibility determination.

Additionally, the Claimant's consultants disagree as to the type of the secondary opacity. Dr. Aycoth described a "p" type opacity (Appendix 17) whereas Drs. Gaziano and Bassali described "t" type opacities (Appendix 16 and 18). These opacities are different shapes. The "p" type opacities are rounded opacities; the "t" type opacities are linear opacities. They are not similar in appearance. The fact that the Claimant's experts could not agree as to the shape of the x-ray changes is a valid reason to reject their opinions as unreliable. Neither the Claimant nor the Board of Review has demonstrated that the Judge erred in rendering his credibility determination.

Furthermore, the Judge observed that the Claimant's consultants could not agree regarding the pleural changes. Dr. Bassali described Grade B pleural changes (Appendix 16); Dr. Aycoth described Grade A pleural changes (Appendix 18). Dr. Gaziano

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Furthermore, the Judge observed that the Claimant's consultants could not agree regarding the pleural changes. Dr. Bassali described Grade B pleural changes (Appendix 16); Dr. Aycoth described Grade A pleural changes (Appendix 18). Dr. Gaziano found no pleural changes at all. Appendix 17 This again is a significant variance in the x-ray reports and is a valid reason for the Judge to reject their opinions. Neither the Claimant nor

found no pleural changes at all. Appendix 17 This again is a significant variance in the x-ray reports and is a valid reason for the Judge to reject their opinions. Neither the Claimant nor the Board of Review has demonstrated that the Judge erred in rendering his credibility determination.

In addition, as the Judge pointed out, Drs. Gaziano, Bassali and Aycoth did not account for non-occupational factors as possible causes for the Claimant's pleural changes. The Judge pointed out that the Claimant was measured at 71" tall and 252 pounds. Appendix 14. The pleural changes seen on the radiographs were described by Dr. Leef, Dr. Hayes, the other members of the OP Board and three other radiologists as subpleural fat. Appendix 11, 13 and 19-21. The failure of the Claimant's consultants to account for the Claimant's body habitus as a cause of the pleural changes seen on the radiographs renders their opinions less reliable than the other evidence of record. This is yet another valid reason for the Judge to reject their opinions.

Additionally, the Judge pointed out that Drs. Gaziano, Bassali and Aycoth were at a disadvantage because of the fact that they did not review multiple x-rays of the Claimant as the experts in the record. Drs. Gaziano and Aycoth read only the OP Board's film (Appendix 17-18); Dr. Bassali read only the 1997 x-ray (Appendix 16). On the other hand, Drs. Walker, Kinder, Leef, Hayes, Willis, Smith, and Sparks read two x-rays taken over a year's period of time. Appendix 11, 13 and 19-21. Dr. Leef testified that a reader has an advantage in having a series of x-rays to review concerning a patient. This is because the reader can account for changes the patient may have undergone during the interim. Appendix 13. Accordingly, the Judge did not abuse his discretion in according lesser weight to opinions of Drs. Aycoth, Bassali and Gaziano.

In summary, Judge Haslebacher set forth a number of valid reasons why the reports of Drs. Gaziano, Bassali and Aycoth are unreliable. These include: (1) the physicians could not agree as to the extent of the Claimant's x-ray changes; (2) the physicians could not agree as to the type of the x-ray changes; (3) the physicians could not agree as to the presence and/or extent of the pleural changes; and (4) the physicians were at a disadvantage by the fact that they did not review all of the x-rays concerning the Claimant. In fact, these discrepancies were so marked that the Judge commented that it makes "one wonder if they were actually looking at the same individual." Appendix 14 at 4. These are all valid factors, which when weighing the x-ray evidence, warrant the accordance of lesser weight to the opinions of Drs. Gaziano, Bassali and Aycoth.

It is indisputable that the Judge's Decision is supported by the reliable and probative evidence of record. As indicated, four members of the OP Board and Drs. Willis, Sparks and Smith read a series of x-rays concerning the Claimant. They are unanimous in their opinion that there is no evidence of occupational pneumoconiosis on any of the x-rays. The opinions of the Claimant's consultants were permissibly discredited for valid reasons. Neither the Claimant nor the Board of Review has shown that the Judge erred in rendering his credibility determinations.

This Court has held that deference must be given to the credibility determinations and inferences made by an 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., 195 W. Va. 297, 465 S.E2d 399 (1995). "Indeed, if the lower tribunal's conclusion is plausible when reviewing the evidence in its entirety, the appellate court may not reverse even if it would have weighed the evidence

differently if it had been the trier of fact.” Board of Educ. of the County of Mercer v. Wirt, 192 W. Va. 568, 579, 453 S.E.2d 402, 413 (1994). In the case at bar, the Administrative Law Judge properly discharged his function as the trier-of-fact in weighing the evidence of record and rendering credibility determinations and findings of fact as to the weight to be accorded to the medical evidence. It has not been shown that his credibility determinations or findings of fact are clearly wrong in view of the record as a whole.

Upon a careful consideration of the evidence of record, the Judge’s Decision and the Board of Review’s Order, it is clear that the Board of Review erred in reversing the Judge’s Decision on this issue. The Judge’s credibility determinations and finding of fact are supported by the reliable and probative evidence of record. Upon reaching that conclusion, the Judge’s Decision on this issue should have been affirmed. Because the Board of Review exceeded its scope of review by reviewing the evidence *de novo* and rendering findings of fact different from those of the Administrative Law Judge, the Board’s Order should be reversed and the Judge’s Decision re-instated.

The Board of Review’s Order is inferentially based upon the rule of liberality. Yet, the application of that evidentiary rule cannot support the Board’s Order.

This Court has held that the rule of liberality “does not relieve the claimants of the burden of establishing their claim and . . . cannot be considered as taking the place of proper and satisfactory proof.” Bilchak v. State Workmen’s Compensation Comm’r, 153 W. Va. 288, 297, 168 S.E.2d 723, 729 (1969). The mere production of some form of evidence in support of a claim, in and of itself, is not sufficient to enable the claimant to sustain his burden of proof. Indeed, a review of cases in which the rule of liberality has been applied demonstrates that the rule comes into play when credible and reliable evidence is presented by both claimant and employer. See e.g. Bias v. Workers’ Compensation Comm’r, 176 W. Va. 421, 345 S.E.2d 23 (1996); Myers, 239 S.E.2d at 124.

In this claim, the x-ray evidence presented by the Claimant does not reasonably or reliably establish the existence of occupational pneumoconiosis. Eight of the eleven physicians who read x-rays in this claim found insufficient evidence of occupational pneumoconiosis. The positive x-ray reports submitted by the Claimant have been discredited as unreliable by the OP Board and the Administrative Law Judge. The liberality rule does not apply when the Claimant's evidence is unreliable. The evidence in this case is not in equipoise. The opinions of the five OP Board members who interpreted the x-rays in this claim, when considered with the reports from Drs. Willis, Sparks and Smith, prove that the weight of the evidence preponderates against the Claimant. Therefore, the Judge correctly affirmed the insufficient evidence ruling, and his Decision should have undisturbed by the Board of Review.<sup>4</sup>

Moreover, the Judge's Decision is consistent with the applicable law. There are two provisions in W. Va. Code § 23-4-6a that require that the Judge's Decision be affirmed in this case. The first provision provides the statutory basis for the granting of 5% awards for occupational pneumoconiosis without pulmonary impairment. That section provides, in pertinent part, "[t]hat if it shall be determined by the division *in accordance with the facts in the case and with the advice and recommendation of the occupational pneumoconiosis board* that an employee has occupational pneumoconiosis, but without measurable pulmonary impairment therefrom, such employee shall be awarded and paid twenty weeks of benefits at the same benefit rate as hereinabove provided." W. Va. Code § 23-4-6a (1998) (emphasis added). This language clearly states that a finding of

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<sup>4</sup>This is particularly true since the Legislature in Senate Bill 2013 specifically rejected the utilization of the rule of liberality to resolve evidentiary conflicts. Rather, the Claimant must establish his case by a preponderance of the evidence. W. Va. Code § 23-4-1g (2003). He has not done so in this case. Accordingly, the Judge's Decision should be undisturbed on appeal.

occupational pneumoconiosis with no measurable impairment can be made only "in accordance . . . with the advice and recommendation of the OP Board."

In this case, the OP Board did not make a recommendation that the Claimant has occupational pneumoconiosis with no measurable impairment. To the contrary, the OP Board testified that there was no reliable x-ray evidence of occupational pneumoconiosis or valid evidence of pulmonary impairment attributable to the Claimant's occupational exposure. The OP Board testified that the correct finding in this claim was insufficient evidence to support a diagnosis of occupational pneumoconiosis. To disregard this finding by the OP Board would violate the clear language in Section 23-4-6a requiring that a 5% award be made only in accordance with the advice and recommendation of the OP Board.

The second provision of Section 23-4-6a that applies in this case is a provision adopted by the legislature in 1995. This provision states that the findings of the OP Board made at the final hearing must be affirmed by the Office of Judges unless the OP Board findings are "clearly wrong in view of the reliable, probative and substantial evidence on the whole record." *Id.* This statutory rule is in keeping with W. Va. Code § 23-4-8a (2002), which provides that the OP Board is responsible for determining all medical questions relating to cases of compensation for occupational pneumoconiosis.

The clearly wrong standard adopted by the legislature in Section 23-4-6a is a deferential standard, which presumes that an administrative law judge's findings are valid as long as the decision is supported by substantial evidence. *See, e.g., Rhodes*, 543 S.E. 2d at 289, (stating that the OP Board's findings are entitled to "considerable deference"; *Conley*, 483 S.E.2d at 542 (stating that a judge's decision is presumed to be valid when it is supported by substantial evidence).

In this case, the OP Board's findings, as stated at the final hearing, are not clearly wrong because they are supported by the OP Board's examination of the Claimant,

its testimony at the final OP Board hearing, as well as the x-ray reports from Drs. Willis, Smith and Sparks. Altogether, eight different physicians have interpreted the x-rays in this claim as negative for occupational pneumoconiosis. Clearly, the OP Board's final hearing testimony that there was no reliable evidence of occupational pneumoconiosis is supported by substantial evidence and, therefore, is presumed to be valid under the deferential clearly wrong standard of review.

In reviewing the evidence in its entirety, it is undisputed that the Board of Review's Order cannot be permitted to stand. The Board exceeded its scope of review by reviewing the evidence *de novo* and by failing to affirm the Judge's Decision despite the fact that the Judge's Decision is supported by the reliable, probative and substantial evidence of record. Further, its decision to grant the Claimant a 5% award is contrary, not only to the evidence of record, but also to the applicable law. For these reasons, the Board of Review's reversal of the Judge's Decision on the medical issue should be reversed and the Judge's Decision re-instated.

#### V. PRAAYER FOR RELIEF

WHEREFORE, for the above stated reasons, the Employer respectfully prays that it does not meet the criteria as a chargeable employer under the statute and should be DISMISSED as a party in this claim. In the alternative, the date of last exposure must be MODIFIED to a date preceding the air monitoring studies commencing on September 28, 1977.

In addition, the Employer respectfully prays that the Board of Review's Order should be REVERSED and Judge Haslebacher's Decision on the medical issue be REINSTATED.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 28, 2006, I served the within Brief in Support of the Petition for Appeal on Behalf of Petitioner, the Fenton Art Glass Company, by depositing a true and exact copy thereof in the United States Mail, postage prepaid, in an envelope addressed to the following:

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