No. 27730 - William Wayne Repass v. Workers' Compensation Division and USX Corporation/U.S. Steel Mining Company, Inc.

No. 28392 - Randall Z. Bower v. Workers' Compensation Division and Maple Meadow Mining Company

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Davis, C.J., dissenting:

It has been said that "[t]he law is the only profession which records its mistakes carefully, exactly as they occurred, and yet does not identify them as mistakes[.]"[1] Truer words could not be spoken of the majority's decision in the case *sub judice* where, with one fell swoop, the Court completely ignores the directives of the workers' compensation legislation which it claims to uphold and proceeds to substitute its own judgment in its stead as to the most reliable indicator of an injured claimant's compensable disability. Not only has the majority successfully turned the rule of liberality into a rule of *laissez-faire*, but it also has failed to recognize that the very result of this ruling will hurt, rather than help, the injured workers of this State. Accordingly, for the various reasons stated below, I dissent.

[1]Elliot Dunlap Smith, *quoted in* Louis M. Brown, *Legal Autopsy*, J. Am. Judicature Soc'y 47 (June 1955).

A. Workers' Compensation: A Legislatively-Administered Program

The first mistake with the majority's reasoning is its misunderstanding of the nature of the workers' compensation system as a legislatively created and legislatively *administered* program. In 1913, the Legislature created the State's workers' compensation system.[2] As a result of this legislation, we frequently have recognized that "[t]he right to workmen's compensation benefits is wholly statutory." Syl. pt. 2, in part, *Dunlap v. State Comp. Dir.*, 149 W. Va. 266, 140 S.E.2d 448 (1965). *Accord Boyd v. Merritt*, 177 W. Va. 472, 474, 354 S.E.2d 106, 108 (1986) ("The right to workers' compensation benefits is wholly a creature of statute[.]"). For this reason,

> "[i]t has been held repeatedly by this Court that the right to workmen's compensation benefits is based wholly on statutes, in no sense based on the common law; that such statutes are sui generis and controlling; that the rights, remedies and procedures thereby provided are exclusive; that the commissioner is authorized to award and pay benefits and that a claimant is authorized to demand payment of benefits only in such manner and in such amounts as are authorized by applicable statutes."

Roberts v. Consolidation Coal Co., 208 W. Va. 218, 234, 539 S.E.2d 478, 494 (2000) (quoting *Bounds v. State Workmen's Comp. Comm'r*, 153 W. Va. 670, 675, 172 S.E.2d 379, 382-83 (1970) (citations omitted)) (additional citations omitted). Due to the statutory nature of the workers' compensation program, the Legislature possesses exclusive authority over the workers' compensation fund, itself, and the distribution of such monies to injured workers. *See generally Lester v. State Workmen's Comp. Comm'r*, 161 W. Va. 299, 315, 242 S.E.2d

[2]*See* 1913 Acts of the Legislature, Regular Session, c. 10.

443, 452 (1978) ("[T]he legislature has the power to modify this state's industrial insurance program as it sees fit so long as no constitutional provision is infringed."); *Bailes v. State Workmen's Comp. Comm'r*, 152 W. Va. 210, 212, 161 S.E.2d 261, 263 (1968) ("The right to workmen's compensation is wholly statutory and is not in any way based on the common law. The statutes are controlling and the rights, remedies and procedure provided by them are exclusive." (citation omitted)).

One such power the Legislature exercises in this regard, and which is the subject of the case *sub judice*, is the authority to adopt rules and regulations to be used in quantifying a claimant's work-related injury into a compensable disability rating. In furtherance of this task, the Legislature has delegated the corresponding rule-making function to the Commissioner of the Bureau of Employment Programs and the Workers' Compensation Division thereof. *See* W. Va. Code § 23-1-1(b) (2000) (Supp. 2001) ("The commissioner is authorized to promulgate rules and regulations to implement the provisions of this chapter."); W. Va. Code § 21A-2-6(2) (1996) (Supp. 2001) (recognizing Commissioner's authority to "promulgate rules"); Syl. pt. 7, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975) ("The State Workmen's Compensation Commissioner may exercise not only the powers expressly granted the office by statute, but also such additional powers of a procedural or administrative nature as are reasonably implied as a necessary incident to the expressed powers of the office."). *See also* W. Va. Code § 23-1-13(a) (1995) (Repl. Vol. 1998) ("The workers' compensation division shall adopt reasonable and proper rules of

procedure, regulate and provide for . . . the nature and extent of the proofs and evidence, the method of taking and furnishing the same to establish the rights to benefits or compensation from the fund . . . or directly from employers . . ., and the method of making investigations, physical examinations and inspections[.]"); W. Va. Code § 23-4-6(i) (1999) (Supp. 2001) ("The workers' compensation division shall adopt standards for the evaluation of claimants and the determination of a claimant's degree of whole body medical impairment.").

To facilitate the adoption of such rules and regulations for disability determinations, the Legislature authorized the Commissioner to create the Health Care Advisory Panel to assist with the "[e]stablish[ment of] protocols and procedures for the performance of examinations or evaluations performed by physicians or medical examiners[.]" W. Va. Code § 23-4-3b(b) (1990) (Repl. Vol. 1998). Similarly, the Legislature established the Compensation Programs Performance Council, W. Va. Code § 21A-3-1 (1993) (Repl. Vol. 1996), [hereinafter referred to as the "Performance Council"] to further assist the Commissioner with the development of such criteria and to "[r]ecommend legislation and establish regulations designed to ensure the effective administration and financial viability of . . . the workers' compensation system of West Virginia." W. Va. Code § 21A-3-7(b) (1993) (Repl. Vol. 1996).[3] The Performance Council is additionally charged with the "[r]eview and

[3]Members of the Performance Council are appointed by the Governor, "by and with the advice and consent of the Senate." W. Va. Code § 21A-3-2 (1993) (Repl. Vol. 1996). In particular, "[t]he compensation programs performance council shall consist of nine (continued...)

approv[al], reject[ion] or modif[ication of] rules and regulations that are proposed or promulgated by the commissioner for the operation of the workers' compensation system before the filing of the rules and regulations with the secretary of state." W. Va. Code § 21A-3-7(c).

In pursuit of this rule-making function, the Commissioner and the Performance Council, informed by the Health Care Advisory Panel, adopted "Guidelines for Permanent Impairment Evaluations, Evidence, and Ratings." *See* W. Va. C.S.R. § 85-16-1, *et seq.* As it relates to the instant appeal, these rules specifically direct that

> on and after the effective date of this rule all evaluations, examinations, reports, and opinions with regard to the degree of permanent whole body medical impairment which a claimant has suffered shall be conducted and composed in accordance with the "Guides to the Evaluation of Permanent Impairment," (4th ed. 1993), as published by the American Medical Association[.]

W. Va. C.S.R. § 85-16-4.1 (1996). In short, the practical effect of this regulation is to require examining physicians to evaluate claimants according to the Diagnosis-Related Estimates [hereinafter referred to as "DRE"] model as opposed to the Range of Motion [hereinafter

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[3](...continued)
members: Four representing the interests of employees; four representing the interests of employers; and the commissioner of the bureau of employment programs." W. Va. Code § 21A-3-3 (1993) (Repl. Vol. 1996). The Council's present members are Gene F. Bailey, Richard W. Humphreys, Chris E. Jarrett, John L. Johnson, Douglas W. Merritt, Robert Phalen, Everette E. Sullivan, Paul E. Thompson, and Commissioner Robert J. Smith.

referred to as "ROM"] model.[4]

To this point, I agree with the majority's analysis. However, it is beyond this juncture that I must part ways with my colleagues and disagree with their reasoning and resultant holdings. Rather than according deference to the Legislature and its attendant entities charged with administering the West Virginia workers' compensation system, the Court takes it upon itself to impermissibly sit as a superlegislature and replace the Commissioner's well-informed guidelines with its preferred method of impairment evaluation for spinal injury claims. *See Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 692, 408 S.E.2d 634, 642 (1991) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 2517, 49 L. Ed. 2d 511, 517 (1976) (per curiam))); *Boyd v. Merritt*, 177 W. Va. at 474, 354 S.E.2d at 108 ("This Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation.").

As the majority aptly notes,

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[4]For further discussion of the DRE and ROM models, see Section B, *infra*.

> [i]t is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.

Syl. pt. 3, *Rowe v. W. Va. Dept. of Corrs.*, 170 W. Va. 230, 292 S.E.2d 650 (1982). Once such a delegation has been made, we typically defer to said agency's interpretations of its governing legislation absent a departure from the original statutory authority imbuing the agency with such power. Syl. pt. 8, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 ("'Where a statute is of doubtful meaning, the contemporaneous construction placed thereon by the officers of government charged with its execution is entitled to great weight, and will not be disregarded or overthrown unless it is clear that such construction is erroneous.' *Syllabus* point 7., *Evans v. Hutchinson*, [158] W. Va. [359], 214 S.E.2d 453 (1975)."). It goes without saying that "[t]he practice of deferring to rationally based legislative enactments is a paradigm of judicial restraint." *State ex rel. Affiliated Constr. Trades Found. v. Vieweg*, 205 W. Va. 687, 698, 520 S.E.2d 854, 865 (1999) (per curiam) (Workman, J., concurring) (internal quotations and citation omitted). Furthermore, with respect to the scenario presently at hand, we have held that

> [i]nterpretations as to the meaning and application of workers' compensation statutes rendered by the Workers' Compensation Commissioner, as the governmental official charged with the administration and enforcement of the workers' compensation statutory law of this State, pursuant to W. Va. Code § 23-1-1 (1997) (Repl. Vol. 1998), should be accorded deference if such interpretations are consistent with the legislation's plain meaning and ordinary construction.

Syl. pt. 4, *State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W. Va. 525, 514 S.E.2d 176 (1999).

Despite these assurances of deference to the Commissioner, who has been entrusted by the Legislature with the administration of the workers' compensation system and the promulgation of rules and regulations to achieve that end, the majority nevertheless substitutes its own judgment for that of the Commissioner, who was duly advised by the Performance Council. If the Commissioner's position could be shown to be contrary to the governing statutes from which he derived his rule-making authority, or if the impairment criteria he has adopted contravened the Legislature's purpose of compensating injured workers, the Court's decision would be tenable. However, apart from a *sua sponte* declaration that the Commissioner's actions oppose the legislative intent, no support is given for the majority's position. Absent this clear indication that the Commissioner has acted inappropriately by promulgating and applying W. Va. C.S.R. § 85-16-4.1, the majority has made a grievous mistake.

Moreover, the majority has erred not only by refusing to defer to the Commissioner but by further imbuing the Office of Judges [hereinafter referred to as the "OOJ"] with rule-making powers which the Legislature never intended it to possess. Throughout its Opinion, the Court references the now infamous *Cottrell* decision[5] wherein the

[5]*Cottrell v. Workers' Comp. Div.*, Claim No. 92-66811 (W. Va. Workers' (continued...)

Chief Administrative Law Judge determined the DRE model of impairment evaluation to be unreliable and announced his intention to disregard such evidence in future claims. My colleagues then laud this position as being the surest course to achieving the legislative objective of providing relief to ailing claimants. Ironically, though, the Legislature *never* intended to accord decisions of the OOJ such deference as it specifically prohibits that entity from formulating, establishing, or otherwise adopting any rule or regulation: "The office of judges *shall not* have the power to initiate or to promulgate legislative rules[.]" W. Va. Code § 23-5-8(e) (2001) (Supp. 2001) (emphasis added). As the OOJ is not, and never has been, imbued with such rule-making authority, the majority's decision to rely upon and embrace the *Cottrell* ruling is just plain wrong.

B. DRE versus ROM Impairment Ratings

The next grievous error committed by the majority concerns its mistaken interpretation of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993, reprinted 1995) [hereinafter referred to as the "*Guides*"] adopted by the Commissioner and its ultimate conclusion that such *Guides* are much more restrictive than their plain language would suggest insofar as they apply to compensable spine injuries. In its decision, the Court correctly states that early editions of the *Guides* authorized examiners to use the ROM model in making their disability determinations. *See generally*

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[5](...continued)
Comp. Office of Judges Aug. 22, 1997).

Guides § 3.3, at 94. Beginning in the 1993 edition of the *Guides*, however, upon which edition the Commissioner relies in W. Va. C.S.R. § 85-16-4.1, the *Guides* abandoned the predominance of the ROM model in favor of the DRE model, which is considered to be a more reliable indicator of an individual's actual degree of impairment resulting from work-related spinal injuries. Therefore, at present, "under the *Guides* the only reason to utilize the [ROM] model [i]s if an injury [i]s not clearly enough defined in the DRE model." *Thomas v. United Parcel Serv.*, 58 S.W.3d 455, 457 (Ky. 2001) (per curiam).

Armed with this knowledge, the majority abruptly halts its investigation into the validity of the DRE model versus the ROM model. Further review of the actual language employed in the *Guides*, however, suggests that the ill-informed decision to completely abandon any reference to the DRE model in disability evaluations was perhaps too hastily made. In its most basic and rudimentary sense, in simplistic and uncomplicated language, the *Guides* specifically advocate the employment of both methodologies to evaluate a claimant's degree of spinal impairment, rather than the wholesale adoption of the DRE model to the complete exclusion of the ROM methodology as suggested by the majority.

> One of the purposes of the *Guides* is to lead to similar results when different clinicians evaluate illnesses and impairments. For evaluating spine impairments, past *Guides* editions have used a system based on assessing the degree of spine motion and assigning impairment percents according to limitations of motion. Impairment percents related to the range of motion were to be combined with percents based on diagnoses or therapeutic approaches and neurologic impairments.

> One concern with the range of motion system has been that in applying it, other clinical data and diagnostic information tend to be ignored. Also, some physicians are concerned about the accuracy and reproducibility of mobility measurements, while others believe the system fails to account for the effects of aging.
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> . . . .
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> [A] recent study of objective methods for examining patients with chronic low-back pain and self-reported, everyday disabilities identified seven clinical measurements that distinguish well between the patients with pain and normal subjects. . . .
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> In this edition of the *Guides*, the contributors have elected to use two approaches. One component, which applies especially to patients' traumatic injuries, is called the "Injury Model" [or "Diagnosis-Related Estimates (DRE) Model"]. This part involves assigning a patient to one of eight categories, such as minor injury, radiculopathy, loss of spine structure integrity, or paraplegia, on the basis of objective clinical findings. The other component is the "Range of Motion Model," described above and recommended in previous *Guides* editions.
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> . . . .
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> If none of the eight categories of the Injury [DRE] Model is applicable, then the evaluator should use the Range of Motion Model.
>
> All persons evaluating impairments according to *Guides* criteria are cautioned that either one *or* the other approach should be used in making the final impairment estimate. . . . However, if disagreement exists about the category of the Injury Model in which a patient's impairment belongs, then the Range of Motion Model may be applied to provide evidence on the question.

Guides § 3.3, at 94 (endnote omitted) (emphasis in original). Thus, it is apparent that the *Guides* advocate the use of the DRE model because it is more reliable than the former ROM model, which yields inconsistent results that are difficult to reproduce when a claimant is

examined by a variety of physicians and fails to account for non-compensable conditions that may aggravate the compensable injury.

In spite of the *Guides*' efforts to promote accurate and reliable disability ratings, the majority forsakes such principles and adopts the ROM model because, they claim, the rule of liberality dictates such a result. Reaching such a conclusion, however, the majority fails to appreciate the very direct and concise language of the *Guides* which counsels examiners to employ "either one *or* the other approach . . . in making the final impairment estimate" and permits reference to be made to the ROM model where disagreement exists as to a definite DRE diagnosis. *Guides* § 3.3, at 94 (emphasis in original). Thus, it is apparent that, insofar as the majority of the Court is concerned, accuracy and reliability have no place in rating back impairments if the evaluation criteria leading thereto does not consistently award the injured claimant the highest disability rating and, consequently, the biggest workers' compensation benefits check.

The majority additionally, and incorrectly, argues that the DRE model can only be used prior to a claimant reaching his/her maximum medical improvement [hereinafter referred to as "MMI"]. To support this assertion, the majority has taken a passage from the *Guides* out of context. In this respect, my colleagues contend that the *Guides*' statement that "surgery to treat impairment does not modify the original impairment estimate" under the DRE model actually means that the DRE model can only be used prior to a claimant reaching MMI.

This is absurd. The *Guides* explicitly, unequivocally, and repeatedly emphasize that the claimant must reach MMI prior to being evaluated for impairment. *See, e.g.*, *Guides* § 3.3, at 94 ("It is emphasized that if an impairment evaluation is to be accepted as valid under the *Guides* criteria, the impairment being evaluated should be a *permanent* one, that is, one that is stable, unlikely to change within the next year, and not amenable to further medical or surgical therapy[.]" (emphasis in original)). In fact, the *Guides* specifically contemplate that the claimant not receive a rating unless and until his/her condition has stabilized, is unlikely to change within the next year, and is not amenable to further medical or surgical therapy. *See id.* The passage relied upon by the majority was extrapolated from a larger discussion which elucidates that the DRE model attempts to document physiologic and structural impairments relying especially upon evidence of neurologic deficits and uncommon, adverse structural changes according to clinical findings that are verifiable using standard medical procedures. In the same context, the *Guides* intend that common developmental findings which affect the general public should not be included in a DRE impairment rating, nor should changes in signs or symptoms that do not result from the injury but rather from the individual claimant's subjective response to the injury. In other words, the DRE model intends to remove from impairment consideration those conditions that vastly affect the general population, as a natural result of non-work related factors such as aging, obesity, and lethargy. The majority, however, fails to appreciate this distinction.

C. Rule of Liberality[6]

The final mistake apparent in the majority's reasoning is in its interpretation and application of the rule of liberality in workers' compensation proceedings. Liberal interpretation has been defined as "[i]nterpretation according to what the reader believes the author *reasonably* intended, even if, through inadvertence, the author failed to think of it." Black's Law Dictionary 824 (7th ed. 1999) (emphasis added). In this case, as well as in other workers' compensation cases recently handed down by this Court,[7] the majority has grossly overextended the rule of liberality, and has lost sight of the reasonableness component of the rule. Before specifically explaining how the majority has misapplied the rule of liberality in the instant case, I pause to briefly examine the history and development of the rule in our workers' compensation jurisprudence.

As earlier noted, the workers' compensation system of this State was created by the Legislature in 1913.[8] At its inception, it was clearly intended that the workers'

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[6]There are actually two applications of the liberality rule in the context of workers' compensation, one that is related to evidentiary matters, and one pertaining to the interpretation of workers' compensation statutes. *See Javins v. Workers' Comp. Comm'r*, 173 W. Va. 747, 758, 320 S.E.2d 119, 130 (1984) ("The time-honored liberality rule is not only a rule of statutory construction, but is also an evidentiary rule." (citations omitted)). This discussion addresses both.

[7]*See McKenzie v. Smith*, ___ W. Va. ___, ___ S.E.2d ___ (No. 29645 June 28, 2002), and *Skaggs v. Eastern Assoc. Coal Corp.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 30190 June 28, 2002).

[8]*See* 1913 Acts of the Legislature, Regular Session, c. 10.

compensation scheme would be liberally construed, as is demonstrated by the following provision from the founding Act:

> [The] commission shall not be bound by the usual common law or statutory rules of evidence, or by any technical or formal rules of procedure, other than herein provided, but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and *to carry out justly and liberally the spirit of this act.*

1913 Acts of the Legislature, Regular Session, c. 10, § 44 (emphasis added).[9] The legislative direction to construe the workers' compensation statutes liberally was noted by this Court in *Poccardi v. Ott*, wherein the following observations were made:

> The statute itself relaxes the common law and statutory rules of evidence and abolishes the technical and formal rules of procedure other than those expressly retained, and requires each claim to be investigated in such manner as may best be calculated

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[9]This statutory authority permitting administrative and judicial tribunals to apply the rule of liberality in workers' compensation litigation represented a sound public policy statement, particularly in consideration of the fact that when the workers' compensation system was created the legislature required both employers *and* employees to contribute funds to the system. In this regard, the legislature expressly provided that "[t]he commission shall establish a workmen's compensation fund from premiums paid thereto by employers and employe[e]s" 1913 Acts of the Legislature, Regular Session, c. 10, § 19. The Workmen's Compensation Act further required that "premiums provided for in this act shall . . . be contributed in proportion of ninety per cent by the employers and ten per cent by the employe[e]s." 1913 Acts of the Legislature, Regular Session, c. 10, § 24. Accompanying the requirement that employees pay part of their wages into the newly developed workers' compensation system was the corresponding demand that the system's laws be justly and liberally construed in favor of those employees, and that evidentiary disputes be resolved in the employees' favor. This was so because employers were able to recoup the money they paid into the system by proportionately raising the price of their products. Employees, on the other hand, had no way of recovering the wages that were withheld from their pay. Thus, in the end, it was the employees and the general consuming public who funded the system, not the employers.

> to ascertain the substantial rights of the parties and *justly and liberally effectuate the spirit and purpose of its provisions*. Its object is beneficent and bountiful, its provisions broad and generous. . . . Strict rules are not to obtain to the detriment of a claimant in violation of these wholesome purposes.

82 W. Va. 497, 500-01, 96 S.E. 790, 791 (1918) (emphasis added.). The above passage from *Poccardi* represents the first comprehensive statement by the Court[10] that the workers' compensation laws were to be liberally construed in favor of the employee.[11] Also incorporated in the Court's acknowledgment that the provisions of this beneficent system should be liberally applied, is the recognition that it should be employed justly, and in a manner calculated to effectuate its spirit and purpose. In other words, liberality must be tempered with reasonableness.

Within a year of the decision in *Poccardi*, however, the Legislature amended the statute and removed the word "liberal" therefrom.[12] This legislative change was observed in

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[10]Although, using terms that were less precise and clear than those used in *Poccardi*, the Court had earlier *indicated* that workers' compensation laws were to be liberally construed. *See Culurides v. Ott*, 78 W. Va. 696, 700, 90 S.E. 270, 271 (1916).

[11]In the case of *Machala v. Compensation Commissioner*, 109 W. Va. 413, 155 S.E. 169 (1930), the Court further clarified that the rule of liberality was to also be applied to construe evidentiary facts in favor of employees.

[12]*See* 1919 Acts of the Legislature, Regular Session, c. 131, § 44, wherein it is stated:

> The commissioner shall not be bound by the usual common law or statutory rules of evidence, but shall adopt formal rules of practice and procedure as herein provided, and may make

(continued...)

the case of *Whitt v. Workmen's Compensation Commissioner*, wherein it was stated in dicta that

> [t]oday, there is no provision in the workmen's compensation law requiring the commissioner, the appeal board, or this Court to apply a rule of "liberality" either in construing the workmen's compensation law or appraising the evidence in a workmen's compensation case.

153 W. Va. 688, 692, 172 S.E. 2d, 375, 377 (1970).[13] Despite the Legislature's omission of the liberality requirement from the workers' compensation code,[14] three years later the Court nevertheless reaffirmed the liberality rule by recognizing that

> [c]ompensation acts being highly remedial in character, though in derogation of the common law, should be liberally and broadly construed to effect their beneficent purpose, *State ex rel. Duluth v. District Court*, 129 Minn. 176, 151 N. W. 912 [(1915)]. All of the states which have passed compensation acts follow this rule of construction. Honold on Work. Comps. Sec. 6.

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[12](...continued)
investigations in such manner as in his judgment is best calculated to ascertain the substantial rights of the parties and to carry out the provisions of this act.

[13]It is interesting to note that at the same time it removed the word "liberal" from the workers' compensation statute, the legislature also removed the requirement that employees had to pay a portion of their wages into the system. *See* 1919 Acts of the Legislature, Regular Session, c. 131, §§ 19 & 24 (obligating employers to fund the system exclusively). It may very well be that by not obligating employees to pay wages into the system, the legislature felt that there was no longer a need to have workers' compensation laws and evidence interpreted liberally in favor of employees. Unfortunately, the legislature did not explicitly state what may very well have been implicitly intended by the amendments.

[14]The charge of liberality has never been returned to the workers' compensation statutes.

Sole v. Kindelberger, 91 W. Va. 603, 607, 114 S.E. 151, 153 (1922). However, the *Sole* Court found it unnecessary to apply the rule of liberality to resolve the issue before it, and commented further that

> If there was any ambiguity in the portions of our act which have been under consideration this rule would be invoked; but we consider the language so plain in the sections noticed that it does not need the application of any rule, except that very wise one which is to the effect that "[t]here is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses." Lewis Sutherland Stat. Con., Sec. 367.

Id. Thus, the *Sole* Court plainly acknowledged that there are limitations to the rule of liberality, and that the rule should not be applied where statutory language is plain. Likewise, the Court has applied the reasonableness standard when implementing the rule as an evidentiary tool. In this respect, we have said "we have a rule of law, namely the liberality rule, which mandates that *reputable* evidence favorable to the claimant be considered and the claimant treated as generously as any *reasonable* view of the evidence would justify." *Persiani v. State Workmen's Comp. Comm'r*, 162 W. Va. 230, 236, 248 S.E.2d 844, 848 (1978) (emphasis added). *See also Thacker v. Workers' Comp. Div.*, 207 W. Va. 241, 248, 531 S.E.2d 66, 73 (1999) (per curiam) (Starcher, C.J., concurring) ("Under the 'rule of liberality,' a claimant is supposed to be given the benefit of all *reasonable* inferences that can be drawn from the evidence in support of his or her claim." (emphasis added)). Other courts similarly have observed such limitations, and also have recognized the reasonableness standard that accompanies the liberality rule. Indeed, it has been said that

> liberality should not . . . extend beyond the clearly expressed language of th[e] [statutes], and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of judicial legislation. . . . [C]onsequently, the judiciary should avoid ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced.

Deese v. Southeastern Lawn & Tree Expert Co., 306 N.C. 275, 277-78, 293 S.E.2d 140, 143 (1982) (citations and internal quotation marks omitted). Additionally, "courts are not free under the guise of liberal construction to extend worker's compensation benefits . . . that do not *reasonably* fall within the statute." *In re. Corman*, 909 P.2d 966, 971 (Wyo. 1996) (citation omitted) (emphasis added). Simply put, "liberality of construction should not proceed to such a point as to amount to judicial legislation." *Ford v. Mitcham*, 53 Ala. App. 102, 104, 298 So. 2d 34, 36 (1974).

In the instant case, the majority has gone too far in the name of liberality. As I have demonstrated above, the liberality rule must be tempered by reasonableness, and must not be used as justification for improper legislating by the Court. Nevertheless, that is exactly what has been done in this case. The Legislature has clearly granted to the Commissioner the authority to establish regulations, with the approval of the Performance Council,[15] for determining an injured worker's level of medical impairment. The majority, apparently dissatisfied with this authority conferred upon the Commissioner, and further displeased with

[15]*See supra* note 3, and accompanying text, for information about the Performance Council and its members.

the regulations actually adopted by the Commissioner, has imposed its own judgment over that of the Legislature, the Commissioner, and the Performance Council. In so doing, the majority has rejected regulations that permitted flexibility on the part of the physicians to use the test that would most likely result in an accurate determination of the level of impairment arising from a back injury, and imposed in its stead the ROM test, which has been deemed largely unreliable by the very profession responsible for its development. There is nothing in the workers' compensation statutory scheme upon which this action may be reasonably based. The majority was obviously motivated by the goal of granting workers' compensation claimants the highest possible disability rating regardless of the realities of their medical conditions.

In the past, the Court has consistently adhered to the principle that "the liberality rule cannot be considered as taking the place of proper and satisfactory proof." *Bilchak v. State Workmen's Comp. Comm'r*, 153 W. Va. 288, 297, 168 S.E.2d 723, 729 (1969). *Accord* Syl. pt. 3, *Clark v. State Workmen's Comp. Comm'r*, 155 W. Va. 726, 187 S.E.2d 213 (1972); *Smith v. State Workmen's Comp. Comm'r*, 155 W. Va. 883, 888, 189 S.E.2d 838, 841 (1972) (per curiam); Syl. pt. 3, *Staubs v. State Workmen's Comp. Comm'r*, 153 W. Va. 337, 168 S.E.2d 730 (1969); *Dunlap v. State Workmen's Comp. Comm'r*, 152 W. Va. 359, 364, 163 S.E.2d 605, 608 (1968); *Hosey v. Workmen's Comp. Comm'r*, 151 W. Va. 172, 176, 151 S.E.2d 729, 731 (1966); Syl. pt. 1, *Deverick v. State Comp. Comm'r*, 150 W. Va. 145, 144 S.E.2d 498 (1965). In the instant case, the majority has used the rule of liberality to expressly permit claimants to use faulty evidence of the extent of compensable back injuries. This

unfortunate and unprecedented use of the rule of liberality will now make it virtually impossible for the Commissioner or employers to defend against inaccuracies in impairment ratings produced by the ROM model.

> A member of this Court has previously explained that
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> > West Virginia's *Constitution* guarantees its citizens access to the courts -- the workers' compensation system is constitutionally acceptable only because it is a speedier, more certain alternative to the court system due to the rule of liberality. If the rule of liberality is eliminated, citizens are deprived of access to a reasonable alternative to the courts -- and therefore, the constitutionality of the workers' compensation system would be called into question.

Thacker, 207 W. Va. at 249, 531 S.E.2d at 74 (Starcher, C.J., concurring) (footnote omitted). What the majority fails to recognize, however, is that the constant raiding of the workers' compensation fund by unjustly increasing the amount of awards, and lowering evidentiary standards into nonexistence, creates a system so financially jeopardized and so clogged with malfeasants that workers who have suffered real injuries and who truly need such monies are deprived of the speedier, more certain route to relief the workers' compensation system was intended to guarantee. In short, "[e]xtreme justice is extreme injustice."[16]

[16]Cicero, *quoted in The Lawyer's Quotation Book: A Legal Companion* 64 (John Reay-Smith ed., 1991).

D. From Magic Words to Magic Tests: The Practical Application of the Majority's Opinion

"The law is a sort of hocus-pocus science."[17] In *Lambert v. Workers' Compensation Division*, ___ W. Va. ___, ___ S.E.2d ___, slip op. at 18-19 (Nos. 30041, 30042, & 30043 Apr. 26, 2002), we cautioned against the reliance on buzzwords or magic phrases in the assessment of an injured employee's degree of impairment. Although the majority seemingly echoes this refrain, ironically it does not practice what it preaches. Behind the smoke and mirrors of the Court's decision in the case *sub judice*, the majority nevertheless adopts not magic words but a magic test, the ROM model, for determining the extent of a claimant's work-related disability. Despite the majority's protestations to the contrary, the practical application of its decision will most certainly "'open the lock' for a claimant seeking compensation." I only hope that the Legislature can uncover this illusion before the Workers' Compensation Fund is depleted to the detriment of future claimants disabled by work-related injuries.

For the foregoing reasons, I dissent. I am authorized to state that Justice Maynard joins me in this dissenting opinion.

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[17]Charles Macklin, *quoted in id.*, at 44.