No. 31599 - Wampler Foods, Inc. v. Workers' Compensation Division, Tammy S. Pancake and Gregory Burton, Executive Director of Workers' Compensation Commission

No. 31600 - State ex rel. Charles Thompson v. Gregory Burton, Executive Director of Workers' Compensation Commission

No. 31653 - State ex rel. Morris Yoakum, Robert Carpenter, Gale Fraley, Alan Kiblinger, Gilbert Kuehl, Robert Meadows, Leonard Davis and Gene Martin v. Gregory Burton, Executive Director of Workers' Compensation Commission

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OF WEST VIRGINIA

Davis, J., concurring, joined by Chief Justice Maynard:

In this proceeding, the majority opinion has upheld the application of various amendments to the workers' compensation statutes as they applied to the parties before the Court in these consolidated actions. Let me be clear, I concur in the result reached by the majority opinion in each of these cases. However, I reach my conclusions as to all but one of the issues presented based upon different reasoning than that used in the majority opinion. For this reason, I concur and write separately to explain my viewpoint. As to the one issue for which I agree with the majority opinion's rationale, I write separately to elaborate on that rationale. In this concurrence, I address certain important points that have been brought to light, though perhaps not thoroughly discussed, in the majority opinion. I

will first discuss the meaning of the term "award," which is found in several of the amended statutes stating that they shall be applied to "all *awards* made on and after the effective date of the amendment and reenactment of this section . . . ."[1] I will then address the Commission's regulation requiring that certain evaluation reports from physicians examining PPD claimants be "acted upon within fifteen working days from the date of the receipt,"[2] and I will conclude by elaborating on the majority opinion's discussion of the requirement for detailed findings under W. Va. Code § 23-5-12(c)(1) (2003) (Spec. Supp. 2003).

A. Meaning of "Award"

At the outset, it should be noted that none of the parties have raised the issue of the meaning of the term "award."[3] As I will explain in more detail below, I believe this is because it is not necessary to define that term to resolve any of the issues presented to the Court in these consolidated cases. Nevertheless, and in spite of the complete absence of any arguments on this issue by the parties, and in the further absence of anything within

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[1]*See, e.g.*, W. Va. Code § 23-3-1(d) (2003) (Spec. Supp. 2003) ("For all *awards* made on or after the effective date of the amendments to this section . . . .") (emphasis added); W. Va. Code § 23-4-1g(a) (2003) (Spec. Supp. 2003) (same); W. Va. Code § 23-4-6(b) (2003) (Spec. Supp. 2003) (same); W. Va. Code § 23-4-6(e)(1) (same); W. Va. Code § 23-4-6(n)(2) (same).

[2]*See* W. Va. C.S.R. § 85-6-4.5(a) (1985).

[3]It appears that during oral argument, some members of this Court asked counsel for the Division about the Division's definition of an "award." In answering, counsel clearly indicated that he did not know what the official position of the Division was on this issue.

the record of any of the cases before the Court to provide guidance on this topic,[4] the majority opinion has, in any event, adopted a definition of this term to be used in connection with the instant cases.[5] In this regard, the majority opinion declares that

> [T]he Division has chosen to define "award" to include *any* decision on any issue by the Division – whether that decision is favorable to the claimant or not. Hence, if the Division issued an order denying a claimant relief on an issue, the Division contends that the order is an "award" under [the 2003 amendments]."

Maj. op. at 20. To justify the position of the Division, the majority opinion notes that this definition comports with one sense of the term "award" as defined in the 5th edition of *Black's Law Dictionary*.[6] The majority goes on, however, to acknowledge that this Court has recognized an alternate definition of the term that "only an 'action of the State Compensation Commissioner and of the Workmen's Compensation Appeal Board, *in allowance of a claim*, [is] an "award"'." Maj. op. at 21 n.12. Ultimately, though, the majority adopted the meaning of the term award that it, correctly or not, attributes to the Commission, that an award is "any decision on any issue by the Division – whether that decision is favorable to the claimant or

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[4] *See* Maj. op. at 19 n.10.

[5] *See* Maj. op. at 21 n.12 ("*for the purposes of this case* we accept the Division's interpretation.") (emphasis added).

[6] Notably, the 7th Edition of *Black's Law Dictionary* has abandoned such a definition and defines the term "award" in the noun sense as "[a] final judgment or decision, esp. one by an arbitrator or by a jury assessing damages," and in the verb sense as "[t]o grant by formal process or by judicial decree <the company awarded the contract to the low bidder> <the jury awarded punitive damages>." *Black's Law Dictionary* 132 (7th ed. 1999).

not." Should the Commission and/or the Legislature disagree with this Court's interpretation of the term "award" as accepted in the majority opinion, then I urge them to act quickly to define this most important term.[7]

Turning to the cases at hand, I will now show why it was not necessary to resolve the meaning of the term "award" to achieve their resolution. To understand this analysis, it must be clear that, unquestionably, the meaning of an "award" would constitute a decision that grants benefits to a claimant. Thus, the uncertainty of whether or not a decision is an "award" arises only where the decision in question is one that is unfavorable to the claimant; that is, one that does not grant benefits. None of the cases before the Court in these consolidated actions involved such a circumstance.

1. Wampler Foods. The case presented by Wampler Foods centered upon conduct by the Appeal Board. In that case, the Division issued an order on October 8, 2001, finding the claimant's injury was not compensable. On December 4, 2002, the Office of Judges reversed the Division's order and ruled that the claimant's injury was compensable. The Appeal Board subsequently issued an order on July 15, 2003, affirming the Office of

[7]In my view, an "award" means only a decision that grants benefits to a claimant.

Judges' decision. Because the Appeal Board's order was issued after the July 1, 2003, effective date of the amendments to the workers' compensation statutes, Wampler Foods argued that the Appeal Board's review had to comply with two specific amendments to the statutes.[8] One of the amended statutes, W. Va. Code § 23-4-1g,[9] pertains to the weighing of evidence, or the rule of liberality, and was made to apply to "all awards made on or after the effective date of the amendment and reenactment of this section[.]"[10] I agree with the majority's ultimate disposition of the application of the rule of liberality. I write separately merely because I would have decided the issue on different grounds.

Wampler Foods contends that the Appeal Board committed reversible error because the Legislature abolished the rule of liberality in 2003 pursuant to W. Va. Code § 23-4-1g (2003) (Spec. Supp. 2003)[11] and W. Va. Code § 23-1-1(b) (2003) (Spec. Supp.

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[8]Wampler Foods also raised a third evidentiary issue that does not involve the 2003 amendments.

[9]The other statutory provision, W. Va. Code § 23-5-12(c)(1), deals with the requirement that decisions, *inter alia*, rendered by the Appeal Board contain certain detail. This provision contains no statement that it applies to "awards made on or after the effective date of the amendment[s]." Therefore, it will not be addressed at this point in my discussion. However, Wampler's substantive argument under this provision is discussed in Section C. *infra*.

[10]Wampler's substantive argument under this provision, that the Appeal Board improperly applied the rule of liberality, is discussed in Section C. 1. *infra*.

[11]W. Va. Code § 23-4-1g(b) (2003) (Spec. Supp. 2003) states in relevant part:

2003).[12] The majority opinion concluded that it was proper for the Appeal Board to apply the rule of liberality because

> [t]he appellee presented evidence of her work-related injury, to both the Division and the Office of Judges, prior to July 1, 2003 with the understanding that the evidence would be examined in light of the liberality rule. To adopt the appellant's position and then hold the appellee to a theoretically different evidentiary standard at the appellate level would, without a doubt, violate the substantive (and likely procedural) due process rights of the appellee.

Maj. op. at 26-27. Contrary to the reasoning of the majority, I believe this is a red-herring assignment of error that has no merit.

> [A] claim for compensation filed pursuant to this chapter must be decided on its merit and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. No such principle may be used in the application of law to the facts of a case arising out of this chapter or in determining the constitutionality of this chapter.

[12]W. Va. Code § 23-1-1(b) (2003) (Spec. Supp. 2003) states in relevant part:

> It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits and that a rule of "liberal construction" based on any "remedial" basis of workers' compensation legislation shall not affect the weighing of evidence in resolving such cases. . . . Accordingly, the Legislature hereby declares that any remedial component of the workers' compensation laws is not to cause the workers' compensation laws to receive liberal construction that alters in any way the proper weighing of evidence as required by section one-g, article four of this chapter.

The order issued by the Appeal Board, stated the following:

> [We have] evaluated the decision of the Office of Judges in light of its manner of applying, or misapplying, the liberality rule and in light of the standard of review contained in West Virginia Code § 23-5-12, as well as the applicable statutory language as interpreted by the West Virginia Supreme Court of Appeals.

Clearly the Appeal Board did not say that *it* was applying the rule of liberality–as contended by Wampler Foods. Instead, the order stated that it merely reviewed the decision of the Office of Judges to determine the manner in which the *Office of Judges* had applied or misapplied the rule of liberality. The Appeal Board was obligated to determine whether the Office of Judges had correctly applied the law that was in place when the Office of Judges rendered its decision. The Appeal Board found that the Office of Judges had not misapplied the rule of liberality.[13] Consequently, Wampler's contention that, instead, the Appeal Board had improperly applied the liberality rule is an incorrect interpretation of the proceedings underlying its appeal and, thus, is without merit. Thus, the definition of the term "award" was irrelevant to the resolution of this issue.[14]

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[13]For obvious reasons, Wampler Foods did not argue that the Office of Judges could not have applied the rule of liberality. That is, at the time the Office of Judges rendered its decision on December 4, 2002, the statutes purporting to abolish the rule of liberality had not yet been enacted into law.

[14]My conclusion as to the irrelevancy of the meaning of an "award" would also tend to explain why neither party briefed the issue.

2. Claimant Charles Thompson. Charles Thompson (hereinafter "Mr. Thompson") was awarded 6% PPD by the Division on July 24, 2003; however, the benefits were incorrectly calculated under the law in place prior to the 2003 amendments. Subsequent to issuing the award, Mr. Thompson was informed by the Division that his benefits would be reduced according to the new standard enacted by the Legislature, effective July 1, 2003, in W. Va. Code § 23-4-6(e)(1) (2003) (Spec. Supp. 2003).[15] Mr. Thompson filed a petition with this Court seeking a writ of prohibition that would require the Division to pay him PPD benefits under the law in place when he was injured.[16] There is no question that the July 24, 2003, order is the determinative order with respect to Mr. Thompson's claim.

The issue raised by Mr. Thompson was resolved in Syllabus point 8 of *State ex rel. ACF Industries, Inc. v. Vieweg*, 204 W. Va. 525, 514 S.E.2d 176 (1999):

> When an employee, who has been injured in the course of and as a result of his/her employment, applies for workers' compensation benefits in the

[15]W. Va. Code § 23-4-6(b) (2003) (Spec. Supp. 2003) contains the language declaring that its provisions apply "[f]or all awards made on and after the effective date of the amendment and reenactment of this section during the year two thousand three . . . ."

[16]In his brief, Mr. Thompson alleged the following grounds as to why he should receive PPD benefits under the law in place prior to the amendments of 2003: (1) he had a vested property interest in PPD benefits, and (2) prior decisions of this Court have held that vested property interests could not be taken away without due process of law.

> form of a permanent total disability (PTD)[, or a permanent partial disability (PPD),] award, the employee's application for such compensation is governed by the statutory, regulatory, and common law as it existed on the date of the employee's injury or last exposure when there is no definite expression of legislative intent defining the law by which the employee's application should be governed.

Under *ACF,* this Court is obligated to defer to legislative enactments changing workers' compensation benefits laws when the Legislature has made its intent clear. It is quite clear from a review of W. Va. Code § 23-4-6(e)(1),[17] that the Legislature intended for this provision to apply to Mr. Thompson's 6% PPD award. The award, which is undisputedly

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[17]W. Va. Code § 23-4-6(e)(1) states in full:

> (e)(1) For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, if the injury causes permanent disability less than permanent total disability, the percentage of disability to total disability shall be determined and the award computed on the basis of four weeks' compensation for each percent of disability determined at the maximum or minimum benefit rates as follows: Sixty-six and two-thirds percent of the average weekly wage earnings, wherever earned, of the injured employee at the date of injury, not to exceed seventy percent of the average weekly wage in West Virginia: Provided, That in no event shall an award for permanent partial disability be subject to annual adjustments resulting from changes in the average weekly wage in West Virginia: Provided, however, That in the case of a claimant whose award was granted prior to the effective date of the amendment and reenactment of this section during the year two thousand three the maximum benefit rate shall be the rate applied under the prior enactment of this section which was in effect at the time the injury occurred.

the determinative order with respect to judging which law to apply, was not made until *after* July 1, 2003.[18]

3. *Yoakum* Claimants. In the final case presented to the Court, eight claimants sought a writ of mandamus to require the Division to apply the PPD benefits statute that was in place at the time of their injuries and/or evaluations.[19] The orders affecting all eight claimants were issued after July 1, 2003. Neither the claimants nor the Division argued in their briefs that resolution of this issue required a determination of what constitutes an "award." This simply was not an issue, as far as the parties were concerned, because all of the claimants received an award entitling them to benefits.[20]

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[18]Nowhere in either Mr. Thompson's brief or the Division's brief is the issue of the meaning of the term "award" raised. The reason for this is simple. Under any rational definition of "award" that would conceivably be adopted, the order granting Mr. Thompson 6% PPD benefits is an "award."

[19]One of the primary arguments asserted by the eight claimants involved essentially the same contention raised by Mr. Thompson. Consequently, I believe Syllabus point 8 of *State ex rel. ACF Industries, Inc. v. Vieweg*, 204 W. Va. 525, 514 S.E.2d 176 (1999), disposed of the first argument raised by the eight claimants. Their other argument involves W. Va. C.S.R. § 85-6-4.5(a), which is addressed in Section B, *infra*.

[20]Morris Yoakum was awarded 25% PPD benefits on August 5, 2003; Leonard Davis was awarded 7% PPD benefits on July 9, 2003; Robert Carpenter was awarded an unspecified percentage of PPD benefits on July 22, 2003; Gale G. Fraley was awarded 24 % PPD benefits on July 2, 2003, an additional 10% PPD benefits on July 30, 2003, and 20% PPD benefits on July 14, 2003; Alan Kiblinger was awarded 5% PPD benefits on August 12, 2003; Gilbert Kuehl was awarded 6% PPD benefits on August 7, 2002, which award was later reduced by order of the Division on August 28, 2003; and Robert L. Meadows was awarded 2% PPD benefits on July 28, 2003. Additionally, Gene Martin was awarded 5%

Having established that is was not necessary to expressly address the meaning of the term "award," I move to my second point of concern, the majority opinion's interpretation of W. Va. C.S.R. § 85-6-4.5(a).

B. W. Va. C.S.R. § 85-6-4.5(a)

The eight claimants in the *Yoakum* case asserted, in part, that the old workers' compensation statutes should apply to their cases because the Division did not render a decision within fifteen days of the submission of medical information pertaining to their claims. According to the claimants, under W. Va. C.S.R. § 85-6-4.5(a) (1985), a regulation promulgated by the Division, the Division *must* rule on PPD claims (other than OP claims) within fifteen days of the submission of medical information on the claims. A careful reading of the majority opinion clearly shows that the majority implicitly adopted the claimants' interpretation of the regulation, but found fault with the evidence they produced to show noncompliance with this regulation.[21]

OP-PPD on July 21, 2003. It should be noted that Mr. Martin's OP-PPD award was subsequently taken from him because the Legislature abolished all entitlement to the statutory 5% OP-PPD award.

[21]*See* Maj. op. at 31 ("The record before the court does not identify whether the physicians who examined the claimants were independent medical examiners appointed by

The regulation in question provides as follows:

> Permanent disability evaluation reports received from physicians to whom claimants have been referred by the Commissioner in claims based upon injuries and occupational diseases other than occupational pneumoconiosis shall be acted upon within fifteen (15) working days from the date of receipt in the Fund.

W. Va. C.S.R. § 85-6-4.5(a). In its brief, the Division contends that the claimants have misinterpreted the regulation. The Division argued that the regulation does not require it to "render a decision" within fifteen days, but rather, merely requires that medical evidence be "acted upon" within fifteen days. Further, the Division pointed out in its brief that, for all practical purposes, it is impossible to render a decision in all cases within fifteen days.

The gist of the Division's argument, which was completely ignored by the majority opinion, is that when a PPD evaluation report is received, various steps must be taken by the Commission before any PPD benefits can be awarded. For instance, such evaluation reports are routinely sent to the Commission's Office of Medical Services for review to determine if the rating physician complied with the American Medical

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the Division, and - aside from the representations made by the claimant's counsel - does not reveal the dates those reports were received by the Division. We therefore cannot say beyond a reasonable doubt that the Division violated any rights of the claimants by failing to act prior to July 1, 2003.").

Association's guidelines on impairment ratings. Also, the Commission must work with the appropriate state agency to determine if any of the PPD award is payable in satisfaction of an order "for child or spousal support entered pursuant to [W. Va. Code § 48-1-1, et seq.]." W. Va. Code § 23-4-18. In addition, the Commission must determine if the claimant received an advance on his or her PPD award in the form of "nonawarded partial benefits" and must make a corresponding offset in the PPD award, if appropriate. *See* W. Va. Code §§ 23-4-7a(c)(2) and 23-4-7a(e) (2003) (Spec. Supp. 2003). These are some of the various *actions* that must be taken by the Commission before the PPD award is made, and nothing in the regulation relied upon requires that the actual award be made within the fifteen (15) days.

It is clear to me that *the Division's interpretation of its own rule* is sound. In light of the majority's implicit rejection of the Division's interpretation of the regulation, I believe the Division should go through the necessary legal procedures to amend the regulation to make clear the meaning of the regulation, and I urge it to take this action promptly.

Accordingly, while I concur in the majority's decision to deny the writ of mandamus as to this issue insofar as I believe the Division's interpretation of the

regulation is logical, I would have denied the writ based upon the conclusion that the claimants' attempt to rely on W. Va. C.S.R. § 85-6-4.5(a) was without merit. *See Cookman Realty Group, Inc. v. Taylor*, 211 W. Va. 407, 417, 566 S.E.2d 294, 304 (2002) (Per Curiam) (Starcher, J., concurring) ("The agency's construction [of its own regulation], while not controlling upon the courts, nevertheless constitutes a body of experience and informed judgment to which a reviewing court should properly resort for guidance.").

C. Detailed Findings Under W. Va. Code § 23-5-12(c)(1)

Finally, I agree with both the majority's rationale and its ultimate disposition of an additional issue that was raised by Wampler: the necessity for detailed findings of fact in an order rendered by the Appeal Board. I write separately only to elaborate on the rationale expressed by the majority.

Wampler argues that the Appeal Board failed to issue an order that set out findings of fact and conclusions of law as required by W. Va. Code § 23-5-12(c)(1) (2003) (Spec. Supp. 2003). This provision of the statute provides that "[a]ll decisions, findings of fact and conclusions of law of the board . . . shall be in writing and state with specificity the laws and facts relied upon to sustain, reverse or modify the administrative law judge's decision." The majority opinion correctly concluded that

> [t]he record presented to the Appeal Board and this Court fully supports the compensability conclusion reached by the Office of Judges, and application of *W. Va. Code,* 23-5-12 [2003] to the instant case would serve no purpose other than to further delay a final resolution and to waste administrative, judicial, and party resources.

Maj. op. at 27. I write separately to explain the legal foundation for this conclusion.

Prior to the enactment of W. Va. Code § 23-5-12(c)(1) in 2003, neither this Court nor any statute required the Appeal Board to issue findings of fact and conclusions of law when it merely affirmed a decision of the Office of Judges. However, in Syllabus point 5 of *Conley v. Workers' Compensation Division*, 199 W. Va. 196, 483 S.E.2d 542 (1997), we held that "when the Workers' Compensation Appeal Board issues an order that is not an affirmance of a ruling by the Workers' Compensation Office of Judges, it must set out adequate findings that support its decision."

It is clear that W. Va. Code § 23-5-12(c)(1) has modified the law by also requiring the Appeal Board to issue findings of fact and conclusions of law when it affirms a decision. Insofar as W. Va. Code § 23-5-12(c)(1) is a procedural change that assists this Court when it reviews challenges to decisions made by the Appeal Board, I believe the Appeal Board's failure to comply with the statute was harmless error. I take this position for

two reasons. First, the Appeal Board's affirmance of the Office of Judges' order meant that it adopted the findings of fact and conclusions of law made by the Office of Judges. Second, in this Court's review of the Appeal Board's order, we are also obligated to examine the order issued by the Office of Judges. Therefore, to the extent that the order of the Office of Judges adequately set out findings of fact and conclusions of law, we know the basis of the Appeal Board's affirmance. *See Adkins v. K-Mart Corp.*, 204 W. Va. 215, 220, 511 S.E.2d 840, 845 (1998) (Per Curiam) (recognizing that the circuit court's summary judgment order did not set out the required findings of fact and conclusions of law, but refusing to reverse the case because of such failure).

To be clear, I believe the Appeal Board should have issued findings of fact and conclusions of law, as now required by W. Va. Code § 23-5-12(c)(1). However, in this instance I am in full agreement with the majority's conclusion that the error was harmless. *See Jennings v. Smith*, 165 W. Va. 791, 792, 272 S.E.2d 229, 230 (1980) (Per Curiam) ("Upon careful consideration of the record, briefs, and oral argument presented on this appeal we affirm, concluding that any error or defect in the proceedings below was . . . harmless.").

In view of the foregoing, I respectfully concur. I am authorized to state

that Chief Justice Maynard joins in this concurring opinion.