No. 26197 -- George W. Thacker v. Workers' Compensation Division and Steel of West Virginia, Inc.

Starcher, C.J., concurring:

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OF WEST VIRGINIA

I am compelled to write a concurrence in this case by the simple, frustrating fact that, if the Workers' Compensation Division, the Office of Judges, and the Workers' Compensation Appeal Board would routinely follow the law, then this appeal would have been totally unnecessary.

The issue in this appeal was quite simple: a claimant received a permanent partial disability award from the Workers' Compensation Division based upon the claimant's reliable test evidence showing the claimant had a breathing impairment caused by occupational pneumoconiosis. The employer later introduced reliable test evidence showing the claimant had no breathing impairment. The "rule of liberality" in general, and West Virginia law and *Javins v. Workers' Compensation Comm'r*, 173 W.Va. 747, 320 S.E.2d 119 (1984) in particular, mandate that a claimant should receive the *highest* percentage of disability which can be determined by reliable test evidence; as per usual, the Office of Judges and the Appeal Board ignored the law and *Javins* and affirmed the entry of an order giving the claimant the *lowest* percentage of disability.

The "rule of liberality" applied by the majority opinion is not some wacky guideline dreamed up in the last few years by out-of-touch "liberals." It is a simple proposition, based in centuries of common law, and incorporated into the first workers' compensation systems created in Germany at the end of the 19th century and in England at the beginning of the 20th century. Before the Legislature even created our workers' compensation system, this Court set out the basis for the rule of liberality in 1910, saying, "That

which is plainly within the spirit, meaning and purpose of a remedial statute, though not therein expressed in terms, is as much a part of it as if it were so expressed." Syllabus Point 1, *Hasson v. City of Chester*, 67 W.Va. 278, 67 S.E. 731 (1910).

West Virginia created its statutory workers' compensation system through the adoption of a comprehensive, remedial statutory scheme in 1913, and as discussed in the majority opinion, the rule that evidence is to be liberally interpreted in favor of a claimant was statutorily embodied in *W.Va. Code*, 23-1-15 [1923].

From the beginning, the workers' compensation commissioner and the courts applied the workers' compensation statutes with the "spirit, meaning and purpose" of the Workers' Compensation Act in mind. The "spirit, meaning and purpose" of the Act was to assure every workers' compensation claimant that limited medical and wage benefits would be quickly paid whenever a claimant was injured in the course of and as a result of their employment, regardless of who was at fault for the injury. In return, the employer would be relieved of any common-law tort liability to the claimant. That was the "trade," the bargained-for tit-for-tat. The claimant gave up his lawsuit, and in return got a right to the speedy payment of medical benefits, speedy payment of a portion of his wages, and a speedy lump sum settlement if the injury was permanent.

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. A claimant is not held to a high standard of proof; the claimant must only provide evidence sufficient to make a reasonable person conclude that an injury or disease exists and can be attributed to a workplace hazard. As we stated in *Eady v. State Compensation Comm'r*, 148 W.Va. 5, 11, 132 S.E.2d 642, 646 (1963):

> the claimant in a workmen's compensation case is not required to establish his claim by clear and unequivocal proof but is only required, in satisfying the burden of proving his claim, to establish it by evidence sufficient to make a reasonable person conclude that the claimant was injured while performing his duties in the course of his employment[.]

In response to the claimant's evidence, the employer bears the burden of showing to some degree of certainty that the claimant does not have an injury or disease, or was not injured on the job. As we stated in Syllabus Point 2 of *Dunlap v. State Workmen's Compensation Comm'r*, 160 W.Va. 58, 232 S.E.2d 343 (1977):

> If an injured employee provides some evidence to demonstrate that a particular injury did arise from the subject industrial accident, absent evidence which to some degree of certainty attributes the injury to a cause other than the subject accident, it will be presumed to have resulted from such accident.

The rule stated in *Dunlap* in interpreting the statute is not intended to eliminate the claimant's burden of proving that he or she sustained an injury or disease in the course of and as a result of their employment. The claimant must still show that his or her injury or disease is tied to a workplace accident or hazard. *W.Va. Code*, 23-1-15, as interpreted by this Court, merely provides "an inference that favors the injured employee and, in effect, it requires the employer to prove to some degree of certainty that the injury did not occur from the industrial accident, if the employer is to prevail on the point." *Dunlap*, 160 W.Va. at 64, 232 S.E.2d at 346.

In a lawsuit, a claimant must prove fault and injury by a preponderance of the evidence. In a workers' compensation claim, the claimant must only introduce enough evidence for a reasonable person to say the claimant has an injury, and that it occurred in the course of and as a result of the claimant's job. The employer bears the burden of proving with certainty that the injury did not occur, or

that it did not occur in the course of and as a result of the claimant's job. If both sides introduce balanced evidence, in the theme of a "did so - did not" argument, then the rule of liberality tips the scale in favor of the claimant.

Between the claimant and the employer is the Workers' Compensation Division, which is supposed to act speedily in an administrative capacity, unbound by any notions of an adversarial system of proof. As we discussed in *Meadows v. Lewis*, 172 W.Va. 457, 469, 307 S.E.2d 625, 638 (1983):

> Under our statutes, the [workers' compensation] commissioner's role is that of a referee only when disputes arise between contestants. Otherwise, the commissioner serves in an administrative fact-finding capacity that is not bound by the traditional rules operative in an adversary system. The [Workers' Compensation] Act is designed to compensate injured workers as speedily and expeditiously as possible in order that injured workers and those who depend upon them for support shall not be left destitute during a period of disability. The benefits of this system accrue both to the employer, who is relieved from common-law tort liability for negligently inflicted injuries, and to the employee, who is assured prompt payment of benefits.

The reason the Division is supposed to act without any notions of an adversarial system of proof, and thereby construe evidence liberally in favor of the claimant, is to assure the claimant that benefits will be quickly paid. When the Division deviates from this role, and fails or refuses to examine evidence with the rule of liberality in mind, the claimant and the employer are denied the sole benefit of the workers' compensation system: a prompt, hassle-free resolution of the claim. Instead, every claim becomes a costly, miniature lawsuit, requiring the claimant and the employer to spend hundreds, if not thousands, of dollars on medical testing and expert testimony. Cases drag out for years -- the instant case was filed in 1991, and 9 years later the claimant's award is still in litigation. Claimants and employers become embroiled in a

costly, time-consuming, bureaucratic game of roulette, fraught with uncertainty, and the courts become clogged with appeals from litigants wanting to take one more turn at spinning the wheel.

If the Division, the Office of Judges, and the Workers' Compensation Appeal Board would steadfastly, consistently apply the rule of liberality, most of the litigation and appeals, and their concomitant costs, would vanish. For example, if the claimant's doctor produced a competent report saying the claimant had an injury with a 10% impairment, under the rule of liberality it would be pointless for the employer to spend thousands of dollars to repeat the test. If the employer's doctor reported a lower percentage of impairment, it would be disregarded; if the employer's doctor reported a higher percentage of impairment -- well, such a report would probably never see the light of day. In the end, the Division would quickly pay the claimant benefits for a 10% permanent partial disability, and years of litigation over who has the "more reliable" test results would be avoided.

Every chamber of commerce in America has, at one time or another, gone in front of every state legislature and proclaimed that "the rule of liberality is killing business in this state," and has begged the legislature to abolish the principle. This argument ignores the fact that every workers' compensation system in every state uses the rule of liberality. It also ignores the fact that, in the absence of the rule of liberality, the workers' compensation system becomes an unreasonably restrictive alternative to the court system. West Virginia's *Constitution* guarantees its citizens access to the courts[1] -- the workers'

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[1]*West Virginia Constitution*, Art. III, section 17, states:

> The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

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.

I am in full agreement with the majority's application of *Javins* in this case, but I would have gone farther. In recent years, I have seen employer's attorneys contending that because the facts in *Javins* concerned the use of blood gas tests and breathing tests in determining the degree of a claimant's impairment, that the liberality rule applied in *Javins* should apply only to cases involving those tests and no other. This is a ridiculous argument. The rule of liberality applies to all aspects of an occupational pneumoconiosis claim, including the determination of whether or not a claimant has pneumoconiosis, whether a claimant has any respiratory impairment, and whether the pneumoconiosis or respiratory impairment is linked to some occupational hazard.

Time and again this Court is asked to review cases where the Office of Judges and the Appeal Board have failed to apply the rule of liberality to disputes over x-ray evidence of the existence of pneumoconiosis, or failed apply the rule to disputes over whether a breathing impairment such as asthma is linked to exposure to dusts, chemicals or fumes in the workplace. While I think these disputes are covered by *Javins*, I would dispense with this problem by adopting the following syllabus point:

> If the parties to a workers' compensation claim introduce reliable, conflicting evidence about the existence of occupational pneumoconiosis, or reliable, conflicting evidence about the existence or degree of respiratory impairment caused by or attributable to exposure to dust or other hazardous materials in the course of the employment, then the Workers' Compensation Division, the Workers' Compensation Office of Judges and the Workers' Compensation Appeal Board must award the

> claimant benefits based upon the reliable evidence that shows either the existence of occupational pneumoconiosis or the highest degree of respiratory impairment. The claimant must be given the benefit of all reasonable inferences the record will allow, and any conflicts in evidence must be resolved in favor of the claimant.

One other issue not discussed by the majority opinion merits attention. We explicitly held in *Javins* and *Persiani v. SWCC*, 162 W.Va. 230, 248 S.E.2d 844 (1978) that the Division, Office of Judges or Appeal Board may only disregard evidence that is "unreliable." Whether evidence is unreliable is a legal determination to be made by the finder of fact, *i.e.*, the Division or Office of Judges, and *not* the Occupational Pneumoconiosis Board. The Occupational Pneumoconiosis Board was merely created as a panel of experts to provide advice to the Workers' Compensation Commissioner on questions arising in occupational pneumoconiosis cases. *See W.Va. Code*, 23-4-8a [1974]. The Board was not created as the final arbiter of the claimant's medical condition, nor the final authority on whether the claimant's, the employer's or the Board's evidence is reliable or probative. To hold otherwise would make the Board the judge, jury and sole witness in every proceeding, thereby throwing constitutional due process protections to the wind. In sum, whether the evidence of a party is unreliable is a determination that must be made by an affirmative showing by the parties in the record, and such an affirmative showing can include the opinions of the members of the Occupational Pneumoconiosis Board.

Additionally, the finder of fact may not rely upon "only probable or conjectural reasons or causes" as a basis for disregarding evidence. *Pripich v. State Compensation Comm'r*, 112 W.Va. at 543, 166 S.E. at 5 (1932). In other words, the party attempting to challenge the suspect evidence must introduce some specific, credible proof that a particular test result is unreliable. The unsubstantiated opinion of an expert, including the members of the Occupational Pneumoconiosis Board, that a particular piece of

evidence is "unreliable" is itself unacceptable. The expert opinion must be accompanied by specific, credible evidence or testimony that the suspect test result is unreliable. And, of course, the opposing party must be given an opportunity to develop their own evidence to refute that expert's opinion regarding unreliability, because "according peculiar weight to a particular expert without prior notice or formal rules in that regard [is] clearly wrong." *Persiani*, 248 S.E.2d at 849.

Lastly, the *Code of State Regulations* establishes eight specific circumstances where a pulmonary function test must be deemed unreliable.

> The effort shall be judged unacceptable and cannot be considered in evaluating pulmonary functional impairment when the subject:
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> (1) Has not reached full inspiration preceding the forced expiration; or
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> (2) Has not used maximal effort during the entire forced expiration; or
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> (3) Has not continued the expiration for at least five (5) seconds or until an obvious plateau in the volume-time curve has occurred; or
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> (4) Has an obstructed mouthpiece or a leak around the mouthpiece (obstruction due to tongue being placed in front of mouthpiece, false teeth falling in front of mouthpiece, etc.); or
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> (5) Has coughed or closed his glottis; or
>
> (6) Has an unsatisfactory start of expiration, one char-acterized by excessive hesitation (or false starts), and therefore did not allow back extrapolation of time zero (0) (extrapolated volume on the volume-time tracing must be less than ten percent (10%) of the FVC); or
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> (7) Has an excessive variability between the three (3) satisfactory curves. The variation between the two (2) largest FEV_1's of the three (3) satisfactory tracings should not exceed seven percent (7%) of the largest FEV_1 or one hundred (100) ml, whichever is greater.
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> (8) Predicted values are derived from Kory's Nomogram.

85 *Code of State Regulations* 1, § 20.8.5(b). The first seven paragraphs of the regulation are fairly clear. However, the last paragraph of the regulation is unclear, and refers to "Kory's Nomogram," a table of predicted breathing volumes for "average" individuals against which a claimant's breathing test results would be measured. *See* Ross C. Kory, *et al*., "The Veterans Administration - Army Cooperative Study of Pulmonary Function," 30 *Am. Jour. of Medicine* 243 (1961). For reasons not apparent from the regulation, it appears that any pulmonary function test of a claimant that is measured against the predicted function capacity established by the Kory study is inherently unreliable.

While the language of the last paragraph in the regulation is clumsily phrased, read in context the regulation means that a pulmonary function test result "shall be judged unacceptable and cannot be considered in evaluating pulmonary functional impairment when . . . [the] predicted values are derived from Kory's Nomogram." I cannot determine from the record in this case the statistical source of the predicted breathing volumes that were used to determine the degree of the appellant's breathing impairment. But if the source was the Kory study, then those test results would be automatically unreliable and void under the Division's regulations.

In the instant case, the Occupational Pneumoconiosis Board did not make reference to any of the eight factors listed in 85 *Code of State Regulations* 1, 20.8.5(b). Instead, the Board dismissed the claimant's medical evidence because the employer's evidence was "more reliable." While a panel of doctors might objectively find a piece of evidence "more reliable," the test under the rule of liberality is "what evidence is reliable *and* most favorable to the claimant." The claimant is presumed to have one shot at getting any benefits for a permanent disability -- if the panel of doctors guesses wrong, or the "more

reliable" evidence is somehow inherently, unnoticeably flawed, then the claimant has lost his one shot at being compensated for his work-related injury.

I therefore concur with the majority's opinion awarding benefits to the claimant.