

No. 27056 -- Robert L. Boggess v. Workers' Compensation Division and Union Carbide Corporation,
and

No. 27057 -- Robert L. Payne v. Workers' Compensation Division and Affiliated Transport, Inc.,
Montgomery Tank Lines and Chemical Leaman Tank Lines

FILED

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OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
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Starcher, J., concurring:

The majority opinion is dead-on right in its holding that the regulation being disputed in this case, 85 C.S.R. 1, § 20.8.5(b), requires the Workers' Compensation Division to use the Kory nomogram in evaluating a claimant's impairment. However, I firmly believe that the use of the Kory study flagrantly violates the equal protection rights of claimants, and undermines the purpose of the Workers' Compensation Act.

What is the Kory nomogram? The majority opinion does not clearly state what the Kory study is, and why it is so problematic. Nearly 40 years ago, Dr. Ross C. Kory gathered 468 "normal" men together at U.S. Army and Veteran's Administration Hospitals. Kory had his test subjects breathe into a machine, a "spirometer," and measured how fast and how much each man could breath in and out. Kory then made a graph based upon the age and height of these test subjects. Using the age and height of a patient, a doctor could look at the Kory graph -- a "nomogram" -- and predict the average breathing ability

of the patient.¹ See Ross C. Kory, et al., “The Veterans Administration - Army Cooperative Study of Pulmonary Function,” 30 Am.J.Med. 243 (1961).

Here’s the problem: Kory’s study contained men who smoked cigarettes and other tobacco products. Nowhere in the study does Kory filter out or account for the effects of smoking on breathing ability. Other doctors who *did* later account for smoking in similar studies discovered that smokers have a significantly, measurably lower breathing capacity than non-smokers.

In sum, Kory’s study is terminally flawed because it does not show the average breathing ability of “normal men.” Instead it shows the average breathing ability of a group of men, many of whom were likely to be smokers. While Kory may not have fully understood that smoking was a serious medical

¹For example, claimant Robert L. Boggess was a 60-year-old man who was 5 feet, 9 inches tall. According to Kory’s study, breathing out as long and hard as he could, Mr. Boggess should have been able to exhale 4.26 liters of air. In a test performed on February 22, 1997, Mr. Boggess actually exhaled 3.31 liters of air -- or 78% of his predicted capacity. Using the Division’s regulations, this computes to a 10% impairment of breathing capacity.

problem in 1961,² anyone with any sense today realizes that smoking has a devastatingly toxic effect on lung tissue.³

Because the Kory nomogram is basically a chart showing the expected breathing capacity of a group of persons likely to include a very large number of smokers, it is particularly unfair in making workers' compensation disability determinations. A perfect analogy to Kory would be doing a study of "normal men" at a Veteran's Hospital, many of whom are healthy, muscular men with experience strolling through minefields and who coincidentally are "randomly" found in the amputee ward, and concluding that the average man has one leg. If such a study were used in the workers' compensation context, we could conclude that every worker who lost a leg was perfectly healthy, because the average "normal" man only

²Let's face it: a very high percentage of post-World War II veterans were smokers, because the military distributed cigarettes to servicemen for free. Historians routinely relate stories of how, when paratroopers and soldiers were preparing to hit the Normandy beaches on D-Day in June 1944, they were each issued a carton of cigarettes. Many soldiers who had never smoked learned to smoke those free cigarettes in the intense combat that followed the invasion. See, e.g., Stephen E. Ambrose, *D-Day, June 6, 1944: The Climatic Battle of World War II* (Touchstone, 1944).

Furthermore, Dr. Kory likely had a different viewpoint about smoking than doctors would today because, in the 1940s, 1950s and 1960s, cigarette companies were hiring doctors to promote and encourage tobacco usage. As one cigarette company touted, "More doctors smoke Camels than any other cigarette." Chesterfield cigarettes would "cause no ills," while Old Gold cigarettes asked smokers: "Why risk sore throats?" A "medical specialist" hired by Chesterfield certified that "the ears, nose, throat and accessory organs . . . were not adversely affected . . . by smoking the cigarettes provided." When tobacco companies started placing filters on cigarettes, Viceroy said that "filtered smoke is better for your health," while the new L&M filter was "just what the doctor ordered."

³See, e.g., Douglas W. Dockery, *et al.*, "Cumulative and Reversible Effects of Lifetime Smoking on Simple Tests of Lung Function in Adults," 137 *Am.Rev.Resp.Dis.* 286, 289-90 (1988) ("Many epidemiologic studies have found a progressive relative loss of pulmonary function with cumulative smoking. . . . Changes in pulmonary function have been observed even among smokers with very short durations of smoking. . . . Several studies have shown that smoking a single cigarette causes an immediate increase in airway resistance and a decrease in expiratory flow.")

has one leg. This sounds absurd, but this is why Kory's nomogram has fallen into disuse in the medical community.

The fact that Kory's study has been thoroughly discredited in the medical community⁴ has not stopped the Workers' Compensation Division from adopting the study as its "baseline" for the average, predicted breathing values for claimants. It is a fundamental principle of administrative law that the Workers' Compensation Division is charged with interpreting, administering, and enforcing the Workers' Compensation Act, and this Court will afford the Division substantial deference in its interpretation of the Act. Syllabus Point 4, *State ex rel. ACF Industries, Inc. v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176 (1999). The regulation drafted by the Division to adopt Kory, while full of clerical errors, is therefore properly interpreted by the majority opinion to require that Kory be used as the baseline for determining whether a claimant is disabled. *McClanahan v. Putnam Co. Comm'n*, 174 W.Va. 478, 481, 327 S.E.2d 458, 462 (1985).

That being said, it is just as clear that the Division's use of Kory violates basic constitutional rights, particularly the right to equal protection. *See W.Va. Const.*, Art. III, § 10. A citizen's right to

⁴A 1990 survey of 139 institutions with respiratory disease training programs in the United States and Canada found that only 5% used the Kory study. *See* Anthony J. Ghio, *et al.*, "Reference Equations Used to Predict Pulmonary Function: Survey at Institutions with Respiratory Disease Training Programs in the United States and Canada," 97 *Chest* 400 (1990).

The study advocated by the claimants' counsel, the "Morris" standard, was used by 47% (65 of 139) of the institutions. *See*, J.F. Morris, *et al.*, "Spirometric Standards for Healthy Nonsmoking Adults," 103 *Am.Rev.Resp.Dis.* 57 (1971); J.F. Morris, *et al.*, "Normal Values for the Ratio of One Second Forced Expiratory Volume to Forced Vital Capacity," 108 *Am.Rev.Resp.Dis.* 1000 (1973). Only 19% of the institutions used the "Crapo" standard, and 17% used the "Knudsen" nomogram. *See* Robert O. Crapo, *et al.*, "Reference Spirometric Values Using Techniques and Equipment that Meet ATS Recommendations," 123 *Am.Rev.Resp.Dis.* 659 (1981); R.J. Knudsen, *et al.*, "Changes in the Normal Maximal Expiratory Flow-Volume Curve with Growth and Aging," 127 *Am.Rev.Resp.Dis.* 725 (1983).

workers' compensation benefits is an economic right, *State ex rel. Blankenship v. Richardson*, ___ W.Va. ___, ___, 474 S.E.2d 906, 914 (1996), and this Court will examine the Legislature's actions to see whether the economic legislative "classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally." Syllabus Point 4, in part, *Gibson v. West Virginia Department of Highways*, 185 W.Va. 214, 406 S.E.2d 440 (1991).

I can perceive no rational basis for why an injured workers' compensation claimant must be measured against another injured person -- like Kory's "smokers" -- to determine the extent of the claimant's disability.⁵ Comparing an impaired occupational pneumoconiosis claimant to an impaired smoker in Kory's study so as to conclude -- not surprisingly -- that the claimant has no breathing impairment has absolutely no proper governmental purpose.⁶

⁵Kory's study examined only 468 "male subjects . . . selected from hospital employees, patients, medical students, resident and full-time physicians of the participating hospitals." This is, by no means, a representative cross-section of society. For instance, I can find no discussion in the Kory study of factors such as race, gender, or national origin of the test subjects -- all factors which can affect the outcome of pulmonary function testing, and all factors which implicate an equal protection analysis.

It also appears that Kory did not account for geographic factors such as the altitude of the test, exposure by the test subjects to environmental and occupational pollution, and socioeconomic status. The body and head position of the test subjects, as well as the time of day that the tests were conducted, are also not discussed. All of these factors can alter a test subject's breathing results. See American Thoracic Society, "Lung Function Testing: Selection of Reference Values and Interpretive Strategies," 144 *Am.Rev. of Resp. Disease* 1202, 1203-1205 (1991).

⁶I believe that there was a purpose behind adopting Kory: limiting every occupational pneumoconiosis claimant's ability to recover benefits for their injury. Most claimants -- in fact, most claimants' counsel -- simply do not understand Kory. They must rely upon the expertise of the Occupational Pneumoconiosis Board in interpreting any breathing tests. While the claimant's own doctor, using a standard other than Kory, may say the claimant is impaired, when the Occupational Pneumoconiosis Board tells the claimant he or she is not impaired (*sub silentio*, because of Kory), the claimant can only

(continued...)

The claimants in the instant case are, in my opinion, correct in arguing that the application of the Kory nomogram to measure the extent of their breathing impairment violated equal protection. Unfortunately, they should have made the argument below, to either an administrative law judge or the Workers' Compensation Appeal Board. Only when an issue is clear will this Court pass upon the constitutional validity of a statute or regulation. A claimant should, upon a sufficient showing, be able to demonstrate below that the use of the Kory standard violates his or her constitutional rights. But this Court is not the proper forum for initiating such an argument.

The Workers' Compensation Act was not designed by the Legislature to be a complicated procedural swamp where claimants are stripped of benefits by an innocuous sounding tool called the "Kory nomogram." The Act was designed so that claimants would give up their right to a tort remedy against their employer, and in return receive a prompt, fair payment of their medical expenses, a portion of their wages, and a set sum for any permanent workplace injuries. By adopting the Kory nomogram, the Division has established a standard such that claimants measured against the Kory nomogram are denied medical benefits and denied any payment for their work related injuries. The use of the Kory study by the Division therefore undermines the beneficent purposes of the Act.

⁶(...continued)
shrug in confusion and say, "Well, that's the Occupational Pneumoconiosis Board for you." In other words, the Division's adoption of the Kory nomogram has a purpose -- it's just not a valid, decent, fair or constitutional purpose.

I therefore begrudgingly concur in the majority opinion -- but hope that, in the future, claimants will begin their assault on the constitutionality of 85 C.S.R. 1, § 20.8.5(b) by making a record before an administrative law judge.