

No. 30041 -- Harvey Lambert v. Workers' Compensation Division and Vecellio & Grogan, Inc.

FILED

July 3, 2002

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Maynard, Justice, concurring in part, and dissenting in part:

I concur with the decisions in the instant cases. I believe that Mr. Lambert's PTD award should have an earlier onset date. However, I have serious concerns with regard to the new law created by the majority in Syllabus Points 3 and 4.

First, I do not agree with new Syllabus Point 4. Because of the substantial differences between social security disability benefits and workers' compensation awards, I believe that the fact that a workers' compensation claimant has been awarded social security disability benefits should not be accorded any greater weight than other evidence in PTD onset date cases.

Second, I would have found a way to award Mr. Lambert a PTD award as of the date of his below-the-knee amputation without revisiting and refining *Miracle* and *Young*. By providing that the beginning for a PTD award should be based on the date on which medical or other expert evidence indicated that a permanent total disability existed, the *Miracle/Young* rule inserted an element of certainty and supplied a much-needed benchmark in the selection

of PTD onset dates. In contrast, the new rule articulated in Syllabus Point 3 of the majority opinion makes the selection of PTD onset dates a much more subjective and uncertain exercise.

Recently, I expressed my conviction that this Court regularly disregards applicable standards of review in order to find for claimants in workers' compensation cases. *See Martin v. Workers' Compensation Div.*, 210 W.Va. 270, 557 S.E.2d 324 (2001) (Maynard, J., dissenting). I fear that the subjective nature of the new totality-of-the-evidence rule announced by the majority will allow that practice to continue.

In conclusion, I concur with the Court's resolution of the instant cases, but I dissent to the newly-formulated law. Accordingly, I concur in part, and dissent in part.