No. 30899 - Verizon West Virginia, Inc., et al., Eastern Associated Coal Corporation v. West Virginia Bureau of Employment Programs, Workers' Compensation Division

No. 30900 - Verizon West Virginia, Inc., et al.,Weirton Steel Corporation v. West Virginia Bureau of Employment Programs, Workers' Compensation Division

No. 30901 - Verizon West Virginia, Inc., et al., Pine Ridge Coal Company v. West Virginia Bureau of Employment Programs, Workers' Compensation Division

FILED
July 2, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, Justice, dissenting:

There are many things wrong with the majority's affirmance of a clearly unlawful and unfair increase in premiums paid by self-insured employers. However, I will limit this dissent to my firm belief that the Workers' Compensation Division exceeded its statutory authority to allocate a portion of the "amortization of discount" to self-insured employers.

First, the numbers are absolutely appalling. According to Eastern Associated Coal, in round numbers, its premium jumped from 1.4 million dollars to 8.7 million dollars, an increase of 7.3 million dollars, in *one* year! When Chief Justice John Marshall said in 1819 that "the power to tax involves the power to destroy," he must have had a case just such as this in mind. To those who say, well, this is not really a "tax," it is a "premium," my response is, call it whatever you like, the end result is the same. If the government has its boot on my neck, it does not matter if it is the left boot or the right boot.

What are we really destroying here? Make no mistake, what is crippled is not just the financial well-being of a few companies doing business in West Virginia, but also scarce West Virginia jobs. Worst of all is the immeasurable harm done to the business community's perception of West Virginia as a place to do business. If you were the CEO of a medium or large business and saw what was done to Eastern in this case, would you come to West Virginia and open a new business? Sadly, what is ultimately destroyed by decisions such as this is future economic development and the possibility of attracting new businesses and new jobs to West Virginia.

I want to emphasize just how much additional premiums some of these self-insured employers were forced to pay. For fiscal year 1998, Eastern Associated Coal's regular premium was approximately $1.4 million. To amortize the discount, Eastern was charged an additional $7,265,945.00, which is more than five times greater than Eastern's regular premium. According to Weirton Steel, a company which has struggled valiantly to keep good West Virginia jobs, it was charged $206,000.00 for fiscal year 1998. Weirton Steel has never subscribed to the Second Injury Reserve Fund and had paid nothing for second injury liabilities prior to July 1, 1998. The evidence shows that the Division charged self insurers a total of almost $46 million for amortization of the discount. There is an old joke about the government simplifying the tax return form to contain only two lines. Line 1 asks, "How much did you make last year?" - Line 2 says, "Send it in." I am afraid that is where we are heading with employers' workers' compensation premiums given the near

bankruptcy of the fund and the lack of political will to stop the monthly hemorrhaging of millions of dollars out of the fund.

It is obvious to me that the Division imposed these significant premium increases without clear statutory authority. In W.Va. Code § 23-2-9(b) (1995), the Legislature spelled out the particular elements to be included in premium computations for self-insured employers. These are:

> (1) A sum sufficient to pay the employer's proper portion of the expense of the administration of this chapter;
> (2) A sum sufficient to pay the employer's proper portion of the expense of claims for those employers who are in default in the payment of premium taxes or other obligations;
> (3) A sum sufficient to pay the employer's fair portion of the expenses of the disabled workers' relief fund; and
> (4) A sum sufficient to maintain as an advance deposit an amount equal to the previous quarter's payment of each of the foregoing three sums.

The majority finds authority for the additional premiums levied against the appellants in subsection (1) in the phrase "the expense of the administration of this chapter." The majority reaches this conclusion despite its recognition that the phrase "expense of the administration of this chapter" is not defined by the workers' compensation act; "historic application of the phrase to self-insured employers' premium rates has only included the routine management costs of the Division[,]" and "the Legislature failed in 1995 to make parallel amendments between the general rate-making section and the self-insured employer premium tax section

of the Act[.]" (Slip op. at 28.).

In a nutshell, the majority reasons as follows. First, the phrase "expense of the administration of this chapter" is ambiguous. Therefore, the Court must interpret the phrase by resorting to other statutory provisions. According to W.Va. Code § 23-1-1(a), "[t]he commissioner of the bureau of employment programs . . . has the sole responsibility for the administration of this chapter except for such matters as are entrusted to the . . . performance counsel." In addition, W.Va. Code § 23-2-5(g) provides that "no employee of an employer required by this chapter to subscribe to the workers' compensation fund shall be denied benefits provided by this chapter because the employer failed to subscribe or because the employer's account is either delinquent or in default." When one adds these together, says the majority, one must conclude that there is statutory authority for the increased premiums levied on self-insured employers.

I fail to follow the majority's reasoning. At the outset, I do not agree that the phrase "the expense of the administration of this chapter" is ambiguous. In Syllabus Point 13 of *State v. Harden*, 62 W.Va. 313, 58 S.E. 715 (1907), *disapproved of on other grounds by Wiseman v. Calvert*, 134 W.Va. 303, 59 S.E.2d 445 (1950), this Court explained that "[a]mbiguity in a statute . . . consists of susceptibility of two or more meanings and uncertainty as to which was intended. Mere informality in phraseology or clumsiness of expression does not make it ambiguous, if the language imports one meaning or intention

with reasonable certainty." In addition, "[i]n the absence of any specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning." Syllabus Point 1, *Tug Valley Recovery Center, Inc. v. Mingo Cty. Comm.*, 164 W.Va. 94, 261 S.E.2d 165 (1979). The common ordinary meaning of the term "administration" is the management or direction of something. In fact, the dictionary definition of "administration" is "the management of any office, business, or organization; direction." *Random House Webster's Unabridged Dictionary* 26 (2nd ed. 1998). It is reasonably certain that "the expense of the administration of this chapter" in W.Va. Code § 23-2-9(b)(1) means the cost of the routine management of the Workers' Compensation Division. There is absolutely so specific indication in the statute that it means something different. Because "administration" is susceptible of only one meaning, it is not ambiguous. Accordingly, W.Va. Code § 23-2-9(b)(1) simply indicates that self-insured employers are responsible to pay their portion of the routine management costs of the Division.

In addition, "[i]t is an accepted rule of statutory construction that where a particular section of a statute relates specifically to a particular matter, that section prevails over another section referring to such matter only incidentally." *Cropp v. State Workmen's Compensation Comm'r,* 160 W.Va. 621, 626, 236 S.E.2d 480, 484 (1977) (citation omitted). The two code sections relied on by the majority, W.Va. Code §§ 23-1-1(a) and 23-2-5(g), relate only incidentally, if at all, to self-insured employers. On the other hand, W.Va. Code § 23-2-9(b)(1) relates specifically to self-insured employers and should prevail.

However, even if it could be concluded that the term "administration" is ambiguous, I do not believe that our rules of statutory construction permit the interpretation of W.Va. Code § 23-2-9(b) arrived at by the majority. It is conceded by the majority that "the Legislature failed in 1995 to make parallel amendments between the general rate-making section and the self-insured employer premium tax section of the Act[.]" (Slip op. at 28.). This Court has recognized that,

> [i]f the legislature includes a qualification in one statute, but omits the qualification in another related statute, courts should assume the omission was intentional; the courts infer that the Legislature intended the qualification would not apply to the latter statute. This canon is a product of logic and common sense, and it has special force when the statutory scheme is carefully drafted.

State v. Sugg, 193 W.Va. 388, 401 n. 14, 456 S.E.2d 469, 482 n. 14 (1995). The workers' compensation scheme is carefully drafted. Therefore, this Court should assume that the Legislature's failure to amend the self-insured employer premium tax section was intentional and should infer that the Legislature did not intend to require self-insured employers to participate in the deficit reduction process.

In sum, this Court should reverse the decision of the Workers' Compensation Division because it has exceeded its statutory authority. *See* W.Va. Code § 29A-5-4(g)(2) (authorizing court reversal of an agency decision in excess of statutory authority). By failing to do so, the majority abandons this Court's traditional rules of statutory construction,

violates the canons of logic and common sense, and forces a wholly unsupported construction on an unambiguous statute in order to reach a desired result which is patently unfair. Accordingly, I dissent. I am authorized to state that Justice Davis joins me in this dissent.