No. 32891 – Virgil T. Helton, State Tax Commissioner of the State of West Virginia v. R. Michael Reed, Chief Administrative Law Judge, West Virginia Office of Tax Appeals, and Elk Run Coal Co., Inc.

FILED
June 30, 2006
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, Justice, dissenting:

On occasion this Court has recognized that the strict enforcement of filing requirements should be tempered by considerations of fairness or equity in order to avoid a harsh result. The majority opinion serves notice, however, that equitable considerations do not apply to all parties equally.

I would have affirmed the circuit court's ruling that Elk Run's petition for a refund should be treated as if it had been properly filed. The facts indicate that Elk Run filed a petition for a refund with the Tax Commissioner on January 24, 2003. Prior to January 1, 2003, Elk Run's petition would have been properly filed. However, on that date, amendments to the applicable statute became effective which required that petitions for a refund be filed with the newly-created Office of Tax Appeals rather than with the Commissioner. Due to the very recent changes in the law, I believe that Elk Run's improper filing was understandable, and that the Commissioner had a duty to forward Elk Run's petition to the proper entity. However, the Commissioner did not forward Elk Run's petition, object to the manner in which Elk Run filed its petition, or give notice to Elk Run

that its petition was improperly filed.

According to the majority, its decision is based in part on the principle that filing requirements like the one at issue are not readily susceptible to equitable modification. Past decisions of this Court, however, suggest otherwise. For example, in the recent case of *Hinchman v. Gillette*, 217 W.Va. 378, 618 S.E.2d 387 (2005), this Court reviewed the dismissal below of a medical malpractice action due to the fact that the appellant's pre-suit notice of claim and screening certificate of merit were defective and insufficient under W.Va. Code § 55-7B-6 (2003). Upon review of that case, I thought it obvious that the appellant's certificate was so deficient under the relevant statute that an immediate dismissal was warranted. The majority, however, disagreed. After finding immediate dismissal too draconian a measure for failure to adhere to the relevant filing requirements, the majority essentially rewrote the requirements and reinstated the appellant's suit.

The Court has also relaxed filing deadlines on behalf of workers' compensation claimants. For example, in *Sypolt v. WCD and W.Va. DHHR*, No. 30812 (Memo. order, March 12, 2003), the claimant was injured on December 31, 1999, which, under the six-month limitation period in W.Va. Code § 23-4-15, gave the plaintiff until approximately July 1, 2000, to file a workers' compensation claim. The *employer* received the claim on June 23, 2000, but the Workers' Compensation Division did not receive the

claim until July 12, 2000. As a result, the Division, the Office of Judges, and the Workers' Compensation Appeal Board all agreed that the claim was untimely. On appeal, this Court reversed the Appeal Board and remanded the claim to the Office of Judges to make a finding that the claim was timely filed despite this Court's previous holding that,

> The filing of an application for compensation in the office of the employer of the claimant in the belief, or with the understanding or expectation, that it would be forwarded to the Compensation Commissioner within the six months' period provided by statute, was not a filing thereof in the office of the Commissioner within the meaning of Code, 23-4-15.

Syllabus Point 2, *Young v. State Compensation Com'r*, 121 W.Va. 126, 3 S.E.2d 517 (1939). *See also Harmon v. WCD and Tug Valley Women's Health Center*, No. 27869 (Memo. order, June 22, 2001) (reversing ruling that claim was untimely where claim was filed 28 days late); *Fox v. WCD and Ravenswood Aluminum Corp.*, No. 27122 (Memo. order, July 27, 2000) (finding that claim should be considered new one despite fact that claimant untimely filed it as a reopening of old claim).

In the instant case, excluding Elk Run from the opportunity to receive a tax refund for the hyper-technical reason relied upon by the majority is unfair and will possibly subject Elk Run's lawyers to a legal malpractice claim. Simply put, there is no good reason to deny Elk Run relief under the facts of this case, especially when one considers that the decision may have been different if Elk Run were a medical malpractice plaintiff or a workers' compensation claimant instead of a coal company. Accordingly, I dissent.