No. 33673 - *Fenton Art Glass Company v. West Virginia Office of the Insurance Commissioner and Jack L. Garrison*

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OF WEST VIRGINIA

Starcher, J., concurring, in part, and dissenting, in part:

I concur with the majority opinion's conclusion in Section III.A. to affirm the order of the Office of Judges on the non-medical issue – although it must be pointed out that this conclusion is nothing more than a Pyrrhic victory for workers' compensation claimants in West Virginia.

I dissent to the remainder of the majority's opinion, including much of the reasoning in Section III.A., because it radically rewrites some 40 years of occupational pneumoconiosis law – and in doing so, completely dispenses with notions of fairness and due process in the adjudication of pneumoconiosis claims. Sadly, this *per curiam* case now sets a disheartening precedent for unfairly resolving other similarly-situated workers' compensation cases.

Let me begin with the majority opinion's resolution of the non-medical issues in this case. *W.Va. Code*, 23-4-8c(b) [2005] says that if a claimant has a respiratory impairment, and the claimant can show he or she was exposed to minute particles of dust in abnormal quantities in the workplace for at least 10 of the 15 years preceding the claimant's date of last exposure to workplace dust, then the claimant is entitled to a rebuttable presumption that the respiratory impairment is the result of occupational pneumoconiosis.

See Syllabus Point 1, *Meadows v. Workmen's Compensation Commissioner*, 157 W.Va. 140, 198 S.E.2d 137 (1973).

The purpose behind the Legislature's adoption of this law in 1969 (and its subsequent re-enactment over the years) is a recognition that, oftentimes, miners and others working in dusty conditions suffer from an occupational pneumoconiosis that cannot be detected by x-rays or other diagnostic techniques. The delicate tissue in a worker's lungs is scarred and damaged by dust, but the only objective symptom of the disease is shortness of breath. It is not until after the worker dies – and, unfortunately, often long after the worker has been denied any type of compensation for lack of x-ray evidence – that an autopsy reveals extensive silicosis, black lung or some other form of pneumoconiosis. To remedy this problem, the Legislature adopted the statutory presumption in *W.Va. Code*, 23-4-8c(b) so that, even in the absence of radiographic evidence of disease, a worker with breathing impairment and a substantial work-related exposure to dust can still receive workers' compensation.

The claimant in this case worked at a glass plant, and testified to some 20 years of working in dusty conditions where he could breathe in hazards like sand, soda ash, glass dust and asbestos. The claimant in this case was routinely exposed to abnormal quantities of minute particles of dust at work – that is, more dust than the claimant routinely encountered in his home, church, grocery store or other facet of life – for 10 of the 15 years preceding his 1997 date of last exposure. The majority opinion therefore rightly concludes that the claimant in this case was entitled to the statutory presumption in *W.Va. Code*, 23-4-

8c(b) that, if he has any chronic breathing impairment, then that impairment is presumed to be caused by occupational pneumoconiosis.

While I agree with this conclusion by the majority, I must also point out that this victory for the claimant is meaningless, because *the claimant in this case doesn't have any evidence of a chronic breathing impairment*.

Which brings me to my reasons for dissenting. The majority opinion's reasoning leading up to its meaningless conclusion regarding the non-medical presumption is, in fact, a vehicle for gutting a claimant's right to due process in the resolution of a workers' compensation claim. The remainder of Section III.A. – and in fact most of the majority opinion's discussion – is dedicated to quietly eviscerating any standards of fairness for the parties in an occupational pneumoconiosis claim. The opinion strips the administrative law judges working in the Office of Judges and on the Board of Review of any real authority or power to be fair; instead, they must follow the testimonial whims of one witness called the Occupational Pneumoconiosis Board.

Let me explain my dissent by pointing out several axioms in workers' compensation law. First, there are three parties to a compensation claim: the claimant, the claimant's employer, *and* the Commission that oversees the administration of the compensation system.

Furthermore, the Legislature has laid out, in great length, a statutory scheme in workers' compensation cases that states the obvious: all three parties in a workers' compensation claim are entitled to have the injured claimant examined by a doctor. *W.Va.*

Code, 23-4-8 [2005] says that "the claimant and employer, respectively, each have the right to select a physician of the claimant's or the employer's own choosing and at the claimant's or the employer's own expense[.]" But in addition to the claimant and the employer, the Commission is also entitled to a medical examination of the claimant. In cases other than occupational pneumoconiosis, *W.Va. Code*, 23-4-8 says that the Commission may, "whenever in its opinion it is necessary, order a claimant of compensation for a personal injury *other than occupational pneumoconiosis* to appear for examination before a medical examiner or examiners selected by the commission[.]" (Emphasis added.)

In cases of occupational pneumoconiosis, the Commissioner has the discretion (but is not required) to refer a claimant to a panel of medical examiners called the Occupational Pneumoconiosis Board ("the O.P. Board"). *W.Va. Code*, 23-4-8 says that "[i]f the compensation claimed is for occupational pneumoconiosis, the commission . . . may . . whenever in the commission's opinion it is necessary, order a claimant to appear for examination before the occupational pneumoconiosis board provided for in section eight-a [§ 23-4-8a] of this article." *W.Va. Code*, 23-4-8a [2005] establishes the O.P. Board as a panel of five physicians "with special knowledge of pulmonary diseases" who are charged with "determin[ing] all medical questions relating to cases of compensation for occupational pneumoconiosis . . . under the direction and supervision of . . . the insurance commissioner."

Reading these statutes *in pari materia*, the *fair* conclusion is that the O.P. Board is simply a panel of expert witnesses who provide guidance to the Commission on medical questions in pneumoconiosis cases.

The O.P. Board is *not* an adjudicatory body, nor is the O.P. Board an investigatory unit or "fact-finder" in any sense of the word. Instead, the O.P. Board is a gaggle of fact witnesses charged with conducting expert examinations of claimants with occupational pneumoconiosis, and providing professional guidance to assist the Commission or other adjudicatory body in making a compensation-related decision.

But I dissent because the majority's opinion elevates the O.P. Board from the status of expert witnesses offering an opinion to the status of virtually unchallengeable judge and jury as well. The majority opinion, with little citation to authority let alone regard for constitutional notions of fairness, elevates the testimony of one class of witness in occupational pneumoconiosis claims to a higher plane above all other witnesses. As the majority opinion at one point states:

> We observe that the O.P. Board is not only a board comprised of experts in the field of occupational pneumoconiosis, but also that the O.P. Board's members are *presumptively impartial*. Accordingly, we believe that *great deference* should be given to the conclusions of the O.P. Board. . . .

___ W.Va. at ___, ___ S.E.2d at ___ (Slip. Op. at 17-18) (emphasis added). At another point, the majority opinion declares that

> . . . because of the *substantial deference* afforded to the O.P. Board in connection with occupational pneumoconiosis cases, the party challenging the O.P. Board's findings and conclusions bears the burden of establishing through competent and reliable evidence that such findings and conclusions are clearly wrong.

___ W.Va. at ___, ___ S.E.2d at ___ (Slip. Op. at 25) (emphasis added).

Contrary to the majority opinion's statement, the O.P. Board is not "presumptively impartial" nor is the O.P. Board's opinion entitled to "great deference" or "substantial deference" when compared to the opinions proffered by the claimant's and employer's experts. To hold otherwise is to ignore any sense of balance or fairness in the adjudication of workers' compensation claims. This Court would never hold that only a claimant's expert is presumptively impartial, or that only an employer's expert is entitled to great deference; yet the majority opinion declares just such a lofty status for the Commission's expert in pneumoconiosis claims.

Furthermore, the majority's opinion creates an unattainable evidentiary burden for the claimant and employer. In this case, the majority opinion declares that the claimant bore the burden of showing the O.P. Board was clearly wrong, and finds that the administrative law judge amply found that "the claimant did not meet his burden with competent, reliable proof." As the majority opinion details, the claimant had three radiologists who found x-ray evidence of pneumoconiosis. But the single radiologist for the O.P. Board gave the opinion that "[t]he purported [x-ray] changes relied upon by the claimant's physicians simply were not present," and then the entire O.P. Board took that opinion one step further and gave a unanimous opinion "[w]ith respect to the medical unreliability of the reports of Drs. Bassali, Aycoth and Gaziano." ___ W.Va. at ___, ___ S.E.2d at ___ (Slip. Op. at 21-22).

Read literally, the majority's opinion creates an impossible, Catch-22 situation for litigants. The majority opinion posits that the only way to overrule an opinion of the O.P.

Board is to introduce competent and reliable evidence showing that the O.P. Board's opinion was clearly wrong. But the majority opinion also makes it clear that it is the O.P. Board – and not the fact-finding judge – who is charged with deciding what evidence is competent and reliable. This is absurd. Nowhere else in our legal system would we hold that a witness has the incontrovertible power, as a matter of law, to displace a judge's authority and declare his own statements to be reliable and declare that an opposing witness's statements are not. Yet that is exactly what the majority opinion holds that the members of the O.P. Board can do in the context of occupational pneumoconiosis claims.

I concede that the majority bases its reasoning, in part, upon *W.Va. Code*, 23-4-6a [2005], which states that an administrative law judge "shall affirm" a determination by the O.P. Board unless the determination is "clearly wrong" in view of the "reliable, probative and substantial evidence" in the record. The flaw in the majority's reliance upon this statute is two-fold. First, the majority opinion goes so far as to hold that the O.P. Board is the arbiter of whether it is "clearly wrong," by empowering the O.P. Board to declare evidence that conflicts with the O.P. Board's theory to be "unreliable" or "not probative." Second, the majority opinion wholly ignores constitutional notions of fairness and due process: the opinion illogically suggests that the Legislature has created an adversarial, administrative law process where the party objecting to the O.P. Board's decision – claimant or employer – cannot ever win.

I suppose that I could presume that the administrative law judges at the Office of Judges will assert some independence and authority to determine the reliability and

competency of a witness's statements separate from the declarations of the O.P. Board, but I know from years of experience that is not likely to happen.[1] I could also take heart in the fact that the majority's opinion is a *per curiam* opinion that contains no new statements of law, but I know that the flawed reasoning of the opinion will be vigorously applied to strip all remaining semblance of due process from the administration of occupational pneumoconiosis claims.

Claimants and employers who are on the losing end of the majority's opinion may want to pursue developing a record showing the unconstitutional nature of the existing occupational pneumoconiosis adjudication system.[2] Perhaps, in future years, a majority of the members of this Court will choose to inject fairness and balance into the heart of the workers' compensation administrative law process.

The best solution would be for the Legislature to take notice of the drastic unfairness that is, *sub silentio*, created by the majority's opinion and craft a legislative

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[1]I do not live in a sterile bubble. I understand – from reviewing thousands upon thousands of claims appealed to this Court – that for many decades, and totally contrary to the rule of liberality, the O.P. Board administrative process has been unfairly skewed such that workers' compensation administrative law judges automatically adopted the opinions of the Board, no matter how ridiculous or contrary to law, and no matter how many contrary medical opinions were offered. I also understand that the Legislature adopted the "clearly wrong" language into *W.Va. Code*, 23-4-6a in 1995 at the insistence of lobbyists for employers, as a means of enshrining into law this pre-existing skewed administrative process.

[2]There is one other point that bears mentioning: in the instant case, the claimant filed his claim in 1997, and now, 11 years later, the claim is still being litigated. Yet the majority opinion cites only to statutes adopted by the Legislature in 2005, and gives no consideration to which procedural or substantive law should truly guide the resolution of this particular claim.

solution that equally balances the interests of claimants, employers and the Commission in occupational pneumoconiosis claims.

I therefore respectfully concur, in part, and dissent, in part, to the majority's opinion.

I am authorized to state that Justice Albright joins in this opinion.