

No. 29645 -- State of West Virginia ex rel. Michael M. McKenzie v. Robert J. Smith, Commissioner, Bureau of Employment Programs, Workers' Compensation Division, and Simonton Building Products, Inc.

No. 27730 -- William Wayne Repass v. Workers' Compensation Division and USX Corporation/U.S. Steel Mining Company, Inc.

**FILED**

**July 9, 2002**

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

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**July 10, 2002**

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

Maynard, Justice, dissenting:

The Pilgrim's Pride Corporation is the second largest poultry producer in the United States. In addition to West Virginia, it has operations in Texas, Arkansas, Arizona, North Carolina, Pennsylvania, Oklahoma, and Virginia. Its products are sold under the Pilgrim's Pride and Wampler Foods labels to food service, retail and frozen entree customers. Its net sales for fiscal 2001 were 2.2 billion dollars. As the largest employer in Hardy County, West Virginia, Pilgrim's Pride has more than 1,600 employees. It annually transports more than 47,000 tractor-trailer loads of feed, live birds and finished products in and out of Moorefield, and its payroll and grower payments in West Virginia exceed 72 million dollars per year.

I am thankful that Pilgrim's Pride chose to do business in West Virginia. It is obvious from the numbers above that its contribution to the State's economy is substantial. While I am grateful this company chose to do business in our state and employ 1,600 of our

wonderful workers, I am a little surprised. Why? Consider this. Of the eight states in which Pilgrim's Pride has an operation, its West Virginia workers' compensation rates are by far the highest. In fact, its West Virginia rates exceed those paid by Pilgrim's Pride in the seven other states combined in which it does business! Look at the numbers. Total workers' compensation premiums paid by Pilgrim's Pride in 2001 equaled \$3,895,539. Of this amount, \$2,468,201 were paid in West Virginia. This is astonishing considering that only 7% of the company's employees work here. In other words, Pilgrim's Pride paid 63% of its total workers' compensation premiums on behalf of 7% of its workforce. In comparison, in the seven other states in which it does business, it paid a total of \$1,407,583 in workers' compensation premiums including only \$22,848 in Arkansas and \$228,930 in Texas.<sup>1</sup> In round figures, Pilgrim's Pride's total compensation bill nationwide is 3.9 million dollars, and 2.5 million of that is paid in West Virginia alone.

There are businesses which by their very nature must operate in West Virginia. These include extractive industries such as coal, gas, and timber. But if you operate a business, such as Pilgrim's Pride, which can locate anywhere in the United States, considering the numbers set forth above, would you locate in West Virginia? While there are many good reasons for businesses to locate here, including high-quality workers, an efficient

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<sup>1</sup>This information is from a report, dated 11/11/01, which was presented to a committee of the West Virginia Legislature by an officer of the Pilgrim's Pride Corporation.

transportation system, and cooperation from local and state officials,<sup>2</sup> the state's onerous workers' compensation rates are significant factors any business would naturally consider before choosing to locate here.

The example of Pilgrim's Pride underscores a serious problem with the West Virginia workers' compensation system. I am convinced that the majority opinions in *McKenzie* and *Repass*, which have the effect of further liberalizing workers' compensation law, only add to the problem. I am joining Justice Davis's dissents in these two cases because I agree wholeheartedly with her analysis of the applicable law. I write separately to discuss what I fear will be the very adverse impact that the majority opinions will have on economic development in this state.

The present workers' compensation system is in very deep trouble. Nobody really knows the exact amount of the system's unfunded liability. Estimates range anywhere from 1.8 billion dollars to more than two billion dollars. My own rough guess is that the unfunded liability may be greater than three billion dollars. While everyone agrees that the workers' compensation system is in dire need of a substantial infusion of cash, there is significant disagreement as to the causes of the problem which are, no doubt, many and

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<sup>2</sup>In its 11/11/01 report, Pilgrim's Pride listed as positive things about West Virginia: its excellent quality of employees; the fact that West Virginia is an optimal area to raise chickens; Corridor H, which is an extremely important means of transportation; and excellent cooperation from local officials.

complex. Some say that the Workers' Compensation Division pays out too much money in frivolous claims. Others say that the system is under funded or that employers are not paying their fair share of premiums. The Charleston Daily Mail recently ran an editorial titled "The Big Debt" concerning the workers' compensation system's fiscal crises. Because I cannot say it any better, I reproduce that editorial here in its entirety.<sup>3</sup>

The concept is simple: A worker injured on the job deserves aid from his employer. In 1913, the Legislature set up the Workman's Compensation Fund as a means of aiding injured workers without lengthy, costly litigation.

Over the years, more than the name has changed. Lawyers took over the program. They transformed it into a series of asterisks that slow economic development. That injures all workers by limiting their opportunities for employment within West Virginia.

Few companies want to invest here because:

- , Workers' Comp is run by the state, not private enterprise.

- , Cases are appealed directly to the state Supreme Court. Half the workload of the high court is settling what should be administrative tasks.

- , The unfunded liability is a debt new employers don't want to share, thus slowing economic development to a crawl.

- , Some of the 185 self-insured companies could fold, dumping their Workers' Comp responsibilities onto other employers.

- , Rulings by the state Supreme Court have liberalized benefit payments beyond the original intent, thus driving up the costs.

- , Some companies beat the system and do not pay the premiums they should.

- , Health-care costs have mushroomed.

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<sup>3</sup>Editorial, *The Big Debt: The State Needs A Handle On Its Workers' Comp Fund*, The Charleston Daily Mail, June 24, 2002, at 4A.

, Too many old claims were never funded properly, i.e., in full.

In light of this, the state's economic development efforts are like putting a fresh coat of paint on an Edsel and pretending it is new.

This will not work. The state needs to face up to its unfunded liability once and for all.

But as State Senate President Earl Ray Tomblin said: "Nobody really knows how much debt we have out there."

Until the state knows how much it owes, the problem remains. And as long as the problem remains, workers' comp is an albatross on the ship of state.

I would like to discuss briefly this Court's role in liberalizing benefit payments "beyond the original intent" which is exemplified in *McKenzie* and *Repass*. As I have said before, this Court regularly conducts a *de novo* review of workers' compensation appeals, which have already been adjudicated before the Division, Office of Judges, and Workers' Compensation Appeals Board, and regularly reverses these bodies in favor of claimants. One way the Court does this is an overuse of the rule of liberality in contravention of plain statutory provisions. One example will suffice. W.Va. Code § 23-4-6a (1995) expressly provides that the decision of the occupational pneumoconiosis board made following a hearing shall be affirmed "unless the decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record." This Court, as a standard practice, abrogates this Legislative mandate, applies the liberality rule, disregards the findings of the occupational pneumoconiosis board, and grants the claimant a higher occupational pneumoconiosis award than can be justified by the evidence.

In the two instant cases, the Court once again skews workers' compensation law to favor claimants, contrary to clear Legislative intent. Specifically, disability awards and payments will now be higher thanks to the newly-mandated Range of Model method to evaluate injuries to the spine, and the fact that claimants now have a right to select their initial health care provider of rehabilitation services with no input by the employer. The undeniable result will be larger payments made by the Workers' Compensation Division at the expense of companies like Pilgrim's Pride. This, in turn, makes West Virginia less desirable than many other states in which to locate a business.

Over the past several years, the Legislature has taken steps to place the workers' compensation system back on solid financial footing. This Court, by issuing opinions like *McKenzie* and *Repass*, has done the opposite. In the midst of this hot, dry summer, one easily imagines the Legislature furiously fighting to subdue the wildfires of workers' compensation unfunded liability while, at the same time, a majority of this Court pours gasoline on the fire.

Accordingly, I dissent.