

No. 31551 – Marfork Coal Company v. Michael O. Callaghan, Secretary, West Virginia Department of Environmental Protection, and Matthew B. Crum, Director, West Virginia Department of Environmental Protection’s Division of Mining and Reclamation, Janice Nease, Freda Williams, and Stephanie R. Timmermeyer, Acting Secretary, West Virginia Department of Environmental Protection

**FILED**

**July 14, 2004**

released at 3:00 p.m.

RORY L. PERRY II, CLERK

SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Starcher, J., concurring:

The dissent compares the actions of the DEP hearing examiner to a “circuit judge indicating publicly that he [sic] believed the accused was a bad person or that he committed the murder,” two weeks before the individual’s trial. Of course, such a judge would be disqualified.

But the author of the dissent and I are both uniquely situated<sup>1</sup> to know that such comments are commonly made by circuit judges *after* a criminal defendant’s conviction – typically during sentencing. As the Court’s opinion demonstrates, the *fact* of Marfork’s multiple offenses and wrongdoing was established conclusively well before Director Crum’s comments on the show cause hearing process, which is essentially a penalty process. Ironically, the analogy and example offered by the dissent as the analytical heart of its argument against the majority opinion – turns out to fully support the majority’s conclusion.

It is also worth noting that the dissent does not point to *one line* of the transcript of the hearing as evidence of any unfairness.

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<sup>1</sup>On this Court, only the dissent’s author and I have served as trial judges.

Like the dissent, I also hate it that a worker has to lose even a day's pay because management has been ignoring environmental and human health and safety laws. (But short-term unemployment benefits are available.) Restaurants have to shut down as a penalty when health inspectors find repeated health and safety violations. MSHA shuts down unsafe mines. The Legislature and Congress set permit suspension as the remedy – we must presume, for good reasons. I have never heard of a coal company offering to pay “huge fines” to avoid their workers losing a day's pay. When we get that case I will have an open mind to the dissent's arguments.

Accordingly, I concur.