Maynard, J., Dissenting Opinion, Case No.25142 State of West Virginia ex rel. ACF Industries, Inc., et al. v. William F. Vieweg, et al.

No. 25142 - State of West Virginia ex rel. ACF Industries, Inc.; Wheeling-Pittsburgh Steel Corporation; Elkay Mining Company; and Consolidation Coal Company v. William F. Vieweg, Commissioner, Workers' Compensation Division, Bureau of Employment Programs; Danny J. Stover; and Melanie McGhee

Maynard, Justice, dissenting:

I dissent because I do not believe the majority's decision in this case is consistent with the Legislature's intent in enacting the 1995 workers' compensation amendments. I also believe that by making the date of injury the operative date for determining which law to apply to an application for a PTD award, the majority takes several steps backward in our workers' compensation jurisprudence.

As stated by the majority, the first rule of statutory construction is to follow legislative intent. The majority does not do that here. All agree that the Legislature's purpose for the enactment of the 1995 workers' compensation amendments was to address the dire financial straits of the Workers' Compensation Fund. The decision in this case is clearly at odds with that intent. According to the Commissioner's March 19, 1998 policy statement where he announced which law would apply to requests for PTD benefits, "[p]resently, there are approximately 2,540 claims referred to as Ferrell 'New Law' claims with a date of injury or date of last exposure prior to May 11, 1995." As a result of this decision, these claims will now be processed using the pre-1995 law which precipitated the Fund's financial crises. With today's decision, the majority has reopened the floodgates of profligacy that has plagued our workers' compensation system.

The figures are truly scary. If one PTD award is worth $400,000 to $500,000, and if all of the 2,540 PTD applicants noted above were granted PTD awards, the cost to the Workers' Compensation Fund would be over a **BILLION** dollars. To be exact, it would cost $1,270,000,000.00. If only half of these applicants were to receive PTD awards, it would amount to a payment of $635,000,000.00 from the Fund. In fairness to the majority, some of these claimants will get a PTD award no matter what our decision is in this case. In fact, some of the claimants are unquestionably totally disabled and should get PTD.

Also, I find the majority's holding that employees' applications for PTD awards are governed by the law as it existed on the date of injury particularly unfortunate. The recent trend in our law has been to dispense with this outdated rule in favor of a flexible approach more responsive to legislative attempts to provide for the efficient management of the Workers' Compensation Fund. As this Court stated in *Pnakovich v. SWCC,* 163 W.Va. 583, 589, 259 S.E.2d 127, 130 (1979), "we no longer feel constrained to maintain strict allegiance to the date of injury as a magical point. The 'magic' of the date of injury pertains to contract law and thus is no longer relevant except to the extent that the equities of the case demonstrate a compelling reliance interest on the part of the employer or employee." There is no compelling reliance interest in this case and, therefore, no reason to adopt the date of injury rule.

In conclusion, I fear that the majority's renewed allegiance to the date of injury in this case may prove to be a means by which this Court will circumvent future legislative attempts at statutory change and result in continuing judicial micro-management of the workers' compensation system. Accordingly, I respectfully dissent.