

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1999 Term

**FILED**

December 2, 1999  
DEBORAH L. McHENRY, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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No. 26197

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**RELEASED**

December 3, 1999  
DEBORAH L. McHENRY, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

GEORGE W. THACKER,  
Appellant,

v.

WORKERS' COMPENSATION DIVISION and  
STEEL OF WEST VIRGINIA, INC.,  
Appellees.

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Appeal from the Workers' Compensation Appeal Board  
Appeal No. 44111  
Claim No. 92-39768

REVERSED AND REMANDED

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Submitted: November 3, 1999  
Filed: December 2, 1999

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The Opinion of the Court was delivered PER CURIAM.

JUDGE GARY JOHNSON, sitting by temporary assignment.

CHIEF JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

JUSTICE MCGRAW concurs.

JUSTICE SCOTT did not participate in the decision of the Court.

## SYLLABUS BY THE COURT

1. “When conflicting medical evidence is presented concerning the degree of impairment in an occupational pneumoconiosis claim, that medical evidence indicating the highest degree of impairment, which is not otherwise shown, through explicit findings of fact by the Occupational Pneumoconiosis Board, to be unreliable, incorrect, or clearly attributable to some other identifiable disease or illness, is presumed to accurately represent the level of pulmonary impairment attributable to occupational pneumoconiosis.” Syllabus Point 1, *Javins v. Workers’ Compensation Comm’r*, 173 W.Va. 747, 320 S.E.2d 119 (1984).

2. “An occupational pneumoconiosis award may not be calculated by splitting the difference between initial findings or awards and subsequent findings or awards. Rather, when conflicting findings or awards are presented to the Workers’ Compensation Appeal Board, those findings or awards indicating the highest degree of impairment, which are not otherwise shown, through explicit findings of fact by the Appeal Board, to be unreliable, incorrect, or clearly attributable to some other identifiable disease or illness, are presumed to accurately represent the level of pulmonary impairment attributable to occupational pneumoconiosis.” Syllabus Point 3, *Javins v. Workers’ Compensation Comm’r*, 173 W.Va. 747, 320 S.E.2d 119 (1984).

Per Curiam:

This appeal from the Workers' Compensation Appeal Board ("Appeal Board") concerns the application of *Javins v. Workers' Compensation Comm'r*, 173 W.Va. 747, 320 S.E.2d 119 (1984), our seminal case on the interpretation of evidence in a workers' compensation occupational pneumoconiosis claim. In this case -- as in many identical workers' compensation cases -- both the Workers' Compensation Office of Judges ("Office of Judges") and the Appeal Board ignored the evidentiary rules for workers' compensation claims set forth in the *West Virginia Code*, and ignored the plain terms of our interpretation of those rules in *Javins*.

The Appeal Board in this case affirmed an order of the Office of Judges that reduced a claimant's workers' compensation permanent partial disability award from 15% to 5%, disregarding reliable evidence that the claimant had a 15% impairment to his breathing capacity. Because of the Appeal Board's and the Office of Judges' failure to apply the well-established evidentiary rules set forth below, we reverse the Appeal Board's decision.

## I.

Beginning in 1965, the appellant, George W. Thacker, was employed by appellee Steel of West Virginia, Inc. at its facility in Huntington, West Virginia. In the course of Mr. Thacker's employment as a machine operator he was routinely exposed to

substantial amounts of dust. As a result of this exposure to dust the appellant developed occupational pneumoconiosis, “a disease of the lungs caused by the inhalation of minute particles of dust over a period of time due to causes and conditions arising out of and in the course of the employment.” *W.Va. Code*, 23-4-1 [1995].

In late 1991, while the appellant was still working for the appellee, he filed a claim seeking workers’ compensation benefits for his occupational pneumoconiosis. On September 21, 1992, the West Virginia Workers’ Compensation Division (“Division”) ruled that the appellant met the statutory requirements to be eligible for workers’ compensation benefits. The Division referred the appellant to the Occupational Pneumoconiosis Board (“OP Board”) for medical testing to determine whether, and if so to what extent, the appellant had a lung injury caused by the inhalation of dust.

The OP Board examined the appellant on February 16, 1993. By the examination of x-ray films, the OP Board diagnosed the appellant with occupational pneumoconiosis. Pulmonary function testing was also performed by the OP Board, and based upon these test results the OP Board concluded that the appellant had sustained a 15% impairment as a result of his lung injury.<sup>1</sup> Based upon the OP Board’s conclusions, the

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<sup>1</sup>A pulmonary function test is a test that measures the maximum amount of air that a claimant can inhale and exhale. Those test results are then compared against the predicted breathing results of an “average” person. Predicted breathing results are derived from a statistical analysis of a population of persons with “normal” breathing. If the breathing results of the claimant are significantly less than the predicted results, and that difference between the results can be linked to the claimant’s exposure to dust, mist, fumes or other occupational lung hazards, then the claimant is considered to be impaired.

(continued...)

Division entered an order on March 8, 1993 granting the appellant a 15% permanent partial disability award.

The appellee-employer protested the Division's order to the Office of Judges, compelling the appellant to submit to a second pulmonary function test on October 11, 1995. At a hearing held on August 20, 1997 before an administrative law judge, the OP Board reviewed the employer's pulmonary function test results as well as the Board's pulmonary function test results. The OP Board did not specifically find that its own earlier test results, which formed the basis for the appellant's initial 15% permanent partial disability award, were unreliable. Instead, the chairman of the OP Board, Dr. James H. Walker, testified that he thought the employer's pulmonary function test was "the best study" and that the employer's test was "the most reliable and accurate study to show any pulmonary impairment." Based upon the employer's pulmonary function test results, the members of the OP Board testified that "there is no valid evidence of any pulmonary impairment" in the appellant.

On October 20, 1997, the Office of Judges entered an order reversing the Division's Order of March 8, 1993. The Office of Judges concluded, based upon the OP Board's testimony, that the appellant "has no impairment of pulmonary function." The order

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<sup>1</sup>(...continued)

The precise percentage of impairment, for purposes of workers' compensation benefits, is determined by consulting a chart in regulations promulgated by the Workers' Compensation Commissioner. See 85 *Code of State Regulations* 1, § 20.8.7, "Table for Impairment of Pulmonary Function."

therefore concluded that the appellant could only receive a 5% permanent partial disability award on the basis of his x-ray diagnosis of occupational pneumoconiosis.<sup>2</sup>

The appellant appealed the order of the Office of Judges to the Workers' Compensation Appeal Board. On May 29, 1998, the Appeal Board, in a one-page order, affirmed the decision of the Office of Judges. This appeal was then filed.

## II.

The Workers' Compensation Act specifically provides that the Division, the Office of Judges, and the Appeal Board are to construe the evidence in workers' compensation claims in a manner that ensures that the rights of the claimant are protected.

*W.Va. Code*, 23-1-15 [1923] states:

The [workers' compensation] commissioner shall not be bound by the usual common-law or statutory rules of evidence, but shall adopt formal rules of practice and procedure as herein

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<sup>2</sup>The 5% award for a diagnosis of occupational pneumoconiosis without breathing impairment is established by *W.Va. Code*, 23-4-6a [1995], which states, in pertinent part, that:

. . . if it shall be determined by the division in accordance with the facts in the case and with the advice and recommendation of the occupational pneumoconiosis board that an employee has occupational pneumoconiosis, but without measurable pulmonary impairment therefrom, such employee shall be awarded and paid twenty weeks of benefits[.]

Every workers' compensation award is "computed on the basis of four weeks' compensation for each percent of disability[.]" *W.Va. Code*, 23-4-6 (e)(1) [1995]. Combining the two statutes, because the claimant was diagnosed with occupational pneumoconiosis with no measurable pulmonary impairment, he was entitled to 20 weeks of benefits, or a 5% permanent partial disability award.

provided, and may make investigations in such manner as in his judgment is best calculated to ascertain the substantial rights of the parties and to carry out the provisions of this chapter.

Since the passage of *W.Va. Code*, 23-1-15 in 1913, this Court has interpreted the statute to require that a spirit of liberality in favor of the claimant be employed in applying the provisions of the Workers' Compensation Act. "[W]e must remember that our legislature has shown an earnest endeavor above everything else to give material justice its due while formal rules of jurisprudence are pushed aside." *Machala v. State Compensation Comm'r*, 109 W.Va. 413, 415, 155 S.E. 169, 170 (1930).

Under the provisions of *W.Va. Code*, 23-1-15, the Division is required "in administering the workmen's compensation fund to ascertain the substantial rights of the claimants in such manner as will 'carry out justly and liberally the spirit of the act[.]'" Syllabus, *Culurides v. Ott*, 78 W.Va. 696, 90 S.E. 270 (1916). To put this statutory intent into practice, this Court has repeatedly held that the statute imposes upon the Division a "duty . . . to give the claimant the benefit of inferences arising in his favor from the facts proved . . ." Syllabus Point 3, *Poccardi v. Public Service Commission*, 75 W.Va. 542, 84 S.E. 242 (1915). When the Division is presented with conflicting evidence, "the presumptions should be resolved in favor of the employee rather than against him." Syllabus Point 1, *Pripich v. State Compensation Comm'r*, 112 W.Va. 540, 166 S.E. 4 (1932).

More recently, this Court has summarized this "rule of liberality" in the following manner: "In all types of compensation cases, conflicts in evidence, medical or otherwise, are to be construed in favor of the claimant." *Javins v. Workers' Compensation*



*Comm'r*, 173 W.Va. 747, 758, 320 S.E.2d 119, 130 (1984). *See also*, *Workman v. Workmen's Compensation Comm'r*, 160 W.Va. 656, 236 S.E.2d 236 (1977); *Myers v. State Workmen's Compensation Comm'r*, 160 W.Va. 766, 239 S.E.2d 124 (1977); *Pennington v. State Workmen's Compensation Comm'r*, 154 W.Va. 378, 387, 175 S.E.2d 440 (1970); *McGeary v. State Compensation Director*, 148 W.Va. 436, 438-39, 135 S.E.2d 345 (1964); *Demastes v. State Compensation Comm'r*, 112 W.Va. 489, 165 S.E. 667 (1932).

In *Persiani v. SWCC*, 162 W.Va. 230, 248 S.E.2d 844 (1978) we specified that the rule of liberally interpreting evidence in favor of the claimant is to be applied in occupational pneumoconiosis claims. We described the liberality rule as one “which mandates that reputable evidence favorable to the claimant be considered and the claimant treated as generously as any reasonable view of the evidence would justify.” 162 W.Va. at 236, 248 S.E.2d at 848 (1978).

*Persiani* presented the Court with the question of how the rule of liberality should be applied “when the claimant introduces expert testimony on disability to the Occupational Pneumoconiosis Board who, as experts themselves, disbelieve the claimant’s evidence and find the evidence of the employer’s examining experts more credible[.]” The question raised in *Persiani* is nearly identical to the issue in this case, where the OP Board similarly concluded that the employer’s pulmonary function tests, which indicated that the appellant had no respiratory impairment, were “more reliable” than the OP Board’s test results indicating a 15% impairment.

This approach used by the OP Board in *Persiani* for interpreting evidence in pneumoconiosis claims was specifically rejected by this Court. We specified that the Division may not accept the OP Board's recommendation to "arbitrarily choose to disbelieve any competent medical testimony in its entirety or to exclude it from consideration altogether, absent credible evidence in the record that the suspect testimony is unreliable." Syllabus, *Persiani*.<sup>3</sup>

*Persiani* concerned the use of blood gas studies as evidence of breathing impairment in an occupational pneumoconiosis claim. The rule of liberality discussed in *Persiani* has at times been mistakenly interpreted as being limited only to evidence of blood gas studies, and this Court has seen argument to the effect that the rule does not apply to other types of evidence in occupational pneumoconiosis claims. See, e.g., *Kubachka v. State Workmen's Compensation Comm'r*, 163 W.Va. 601, 259 S.E.2d 21 (1979).

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<sup>3</sup>We held in the Syllabus of *Persiani* that:

In claims under the Workmen's Compensation Act, *W.Va. Code*, 23-1-1, [1971] *et seq.* for disability resulting from occupational pneumoconiosis where conflicting results from blood gas studies are introduced into evidence, one of which is favorable to the claimant and one of which is unfavorable, the Commissioner is required to apply the liberality rule in the same manner as in other cases involving the evaluation of medical evidence, and while he is not required under the liberality rule to accept any particular result as dispositive of the case, he may not arbitrarily choose to disbelieve any competent medical testimony in its entirety or to exclude it from consideration altogether, absent credible evidence in the record that the suspect testimony is unreliable.

In *Javins v. Workers' Compensation Comm'r*, 173 W.Va. 747, 320 S.E. 119 (1984), we made absolutely clear that the rule of liberality applies to all types of evidence concerning the degree of impairment caused by an occupational pneumoconiosis. When the parties in a workers' compensation claim introduce reliable, conflicting medical reports regarding the degree of impairment caused by occupational pneumoconiosis, the Division, Office of Judges and Appeal Board must give the claimant "the benefit of all reasonable inferences the record will allow; and any conflicts must be resolved in favor of the claimant." 173 W.Va. at 758, 320 S.E.2d at 130. As we stated, in Syllabus Points 1 and 3 of *Javins* [with a footnote added]:

1. When conflicting medical evidence is presented concerning the degree of impairment in an occupational pneumoconiosis claim, that medical evidence indicating the highest degree of impairment, which is not otherwise shown, through explicit findings of fact by the Occupational Pneumoconiosis Board,<sup>4</sup> to be unreliable, incorrect, or clearly attributable to some other identifiable disease or illness, is presumed to accurately

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<sup>4</sup>This language in Syllabus Point 1 of *Javins*, that the "unreliability" of evidence must be shown "through explicit findings of fact by the Occupational Pneumoconiosis Board," is technically incorrect. The OP Board does not statutorily make legal findings of fact in a claim.

*W.Va. Code*, 23-4-8c [1993] only authorizes the OP Board to make a report of its "findings and conclusions on every medical question in controversy," and to inform the Division of those findings and conclusions. The Division is ultimately responsible for reviewing and investigating the claimant's condition, taking into account the OP Board's report. *W.Va. Code*, 23-5-1 [1995].

When the parties protest a decision made by the Division in an occupational pneumoconiosis claim, it is the administrative law judges employed by the Office of Judges, not the members of the OP Board, who are charged with independently making "findings of fact and conclusions of law[.]" *W.Va. Code*, 23-5-9 [1995].

represent the level of pulmonary impairment attributable to occupational pneumoconiosis.

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3. An occupational pneumoconiosis award may not be calculated by splitting the difference between initial findings or awards and subsequent findings or awards. Rather, when conflicting findings or awards are presented to the Workers' Compensation Appeal Board, those findings or awards indicating the highest degree of impairment, which are not otherwise shown, through explicit findings of fact by the Appeal Board, to be unreliable, incorrect, or clearly attributable to some other identifiable disease or illness, are presumed to accurately represent the level of pulmonary impairment attributable to occupational pneumoconiosis.

We interpret the rule set forth in *W.Va. Code*, 23-1-15 and *Javins* to be quite simple: if the parties to a workers' compensation claim introduce reliable, conflicting evidence about the degree of respiratory impairment caused by or attributable to occupational pneumoconiosis, then the Division, the Office of Judges and the Appeal Board must award the claimant benefits based upon the reliable evidence that shows the highest degree of impairment. The claimant must be given the benefit of all reasonable inferences the record will allow, and any conflicts in the evidence must be resolved in favor of the claimant.

The basis for our ruling in *Javins* is that it is difficult, if not impossible, to precisely determine the degree of a claimant's breathing impairment caused by occupational pneumoconiosis, or to separate out non-occupational causes. "Each method of testing for pulmonary impairment involves a combination of human skill and medical technology. Associated with this combination is not only the possibility of accuracy, but also the possibility of inaccuracy due to technician error, faulty equipment, or any number of other

potential problems.” *Javins*, 173 W.Va. at 757, 320 S.E.2d at 129.<sup>5</sup> *In accord*, *Persiani*, 162 W.Va. at 236, 248 S.E.2d at 848. (“All tests are performed by men and women who are subject to human error, philosophical predisposition, and even, occasionally, unimaginative cupidity.”)

Accordingly, because it is impossible to measure and account for these variations between test results, when confronted with conflicting medical evidence on the existence, cause or degree of impairment, the Division, Office of Judges and Appeal Board may not base a disability determination on evidence that the OP Board suggests is the “most reliable.” Disability determinations must be made upon that evidence that is reliable and most favorable to the claimant.

In the case before us today, the pulmonary function testing performed by the OP Board supported a 15% permanent partial disability award. There is nothing in the

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<sup>5</sup>The American Thoracic Society has also recognized that pulmonary function test results may vary for a host of different, uncontrollable reasons. The Society recognizes that equipment used to measure breathing impairment has substantial variability, and that an accurate measure of impairment with such equipment “is not easy to establish.” American Thoracic Society, “Lung Function Testing: Selection of Reference Values and Interpretive Strategies,” 144 *Am.Rev. of Resp. Disease* 1202, 1203 (1991). The Society has found that a piece of pulmonary function testing equipment can be precise, meaning it consistently repeats measurements, but can still be inaccurate in that those measurements cannot be repeated on another machine. “Because most instruments have better precision than accuracy, between-instrument variation usually contributes more to total measurement variability than within-instrument variation.” *Id.*

The Society has identified many of the factors that can cause differences between pulmonary function test results, including the instrument used, the subject’s posture, the person observing the test, the software used in the equipment, the temperature and altitude where the test is performed, and diurnal, seasonal and endocrinologic effects on the patient. *Id.*

record to suggest that the OP Board's test was unreliable. The subsequent pulmonary function test performed on behalf of the employer supported the existence of occupational pneumoconiosis with no breathing impairment, or a 5% permanent partial disability award. Again, there is nothing in the record to suggest that this test was unreliable.

Applying the plain language of the *West Virginia Code* and *Javins* to the facts in this case, it is clear that on this evidence the appellant is entitled to a 15% permanent partial disability award. The testimony by the members of the Occupational Pneumoconiosis Board that the evidence supporting the 15% permanent partial disability award was less reliable than the employer's evidence is irrelevant. The Office of Judges and the Appeal Board are charged with operating independently from the Occupational Pneumoconiosis Board, and should have weighed the Board's testimony in its proper context. Because the evidence that the appellant has a 15% permanent partial disability as a result of exposure to occupational pneumoconiosis hazards was reliable, the Division's original award in favor of the appellant should have been affirmed.

### III.

We therefore reverse the May 29, 1998 decision of the Workers' Compensation Appeal Board, and remand the claim for entry of a 15% permanent partial disability award.

Reversed and Remanded.