No. 27781 -- John Taylor, et al. v. Mutual Mining, Inc., Island Creek Coal Company, Island Creek Corporation, Consol, Inc., and Laurel Run Mining Company

Starcher, J., dissenting:

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I dissent to the majority opinion's refusal to allow the plaintiffs a remedy under the Wage Payment and Collection Act ("the Act"), so that they may collect wages and fringe benefits that their employer refused to pay.

The Act, specifically *W.Va. Code*, 21-5-1(c), defines "wages" as "compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation."[1] Under this statute, the employer and employee can "agree" on a way to calculate wages (*e.g.*, $5.25 in cash per hour worked). Once the employee performs and provides services or labor, then the employer must respond and compensate the employee pursuant to the "contract."

W.Va. Code, 21-5-1(c) specifically says that the term "wages" "shall also include then accrued fringe benefits capable of calculation and payable directly to an employee[.]" A "fringe benefit"

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[1]*W.Va. Code*, 21-5-1(c) defines "wages" in the following way:

> (c) The term "wages" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation. . . . [T]he term "wages" shall also include then accrued fringe benefits capable of calculation and payable directly to an employee: Provided, That nothing herein contained shall require fringe benefits to be calculated contrary to any agreement between an employer and his employees which does not contradict the provisions of this article.

includes such things as vacation, holidays, sick leave, or production bonuses. *W.Va. Code*, 21-5-1(l).[2] Hence, under the statute, an employer and an employee can also "agree" on a way to calculate fringe benefits that are payable just like wages (*e.g.*, 1.5 days of sick leave for each month worked). Again, once the employee performs and provides services or labor, then the employer must respond and compensate the employee with the fringe benefit pursuant to the means of calculation set forth in the "contract."

The statute says that wages include fringe benefits "capable of calculation" and "payable directly to an employee." "Calculate" means to "ascertain or determine beforehand, esp. by arithmetic," while "payable" means "due . . . owed, owing, outstanding, unpaid, receivable." *Oxford Desk Dictionary and Thesaurus, American Edition* (1997).

Hence, the term "wages" in *W.Va. Code*, 21-5-1(c) includes vacation and sick leave that can be arithmetically determined before services are rendered by the employee, and which are due, owing, and as yet unpaid to an employee who has provided services. These fringe benefits became part of the plaintiff-employees' overall compensation earned during their periods of employment.

There is nothing in the Wage Payment and Collection Act that requires an employer to offer fringe benefits. Nothing in the Act compels an employer to give his employees time off for vacation, or for holidays, or for sick leave. Employers choose to offer fringe benefits because it appeals to employees, and makes the job more enticing.

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[2] *W.Va. Code*, 21-1-5(l) defines "fringe benefits" in the following manner:

> (l) The term "fringe benefits" means any benefit provided an employee or group of employees by an employer, or which is required by law, and includes regular vacation, graduated vacation, floating vacation, holidays, sick leave, personal leave, production incentive bonuses, sickness and accident benefits and benefits relating to medical and pension coverage.

But, once an employer makes the choice to offer a fringe benefit, then *W.Va. Code*, 21-5-1(c) takes over and ensures that if the employee performs the specified work in expectation of receiving the fringe benefit, then the employer may not make the earned benefit illusory.

The instant case contains repeated instances where the employer offered wages and fringe benefits as part of a wage package to its employees, and the employees showed up for work expecting to receive the wages and fringe benefits. After the employees performed their part of the bargain -- after the wages and fringe benefits became due and "payable directly to an employee" -- the employer reneged on the bargain and refused to pay.

For example, in the Parkinson arbitration matter, the appellees showed up for work and, as part of their wages, were to receive vacation pay. The employers, who received a benefit from the appellees' labor, refused to pay the wages due and owing. Under the Wage Payment and Collection Act, the unpaid vacation pay constituted wages, and the Act provides a mechanism for the collection of those unpaid wages. Similarly, in the Tanzman arbitration award, the employees were promised a daily wage for showing up to work and being retained at the job on the basis of seniority. The employee at issue, John Taylor, lived up to his end of the bargain. The employer laid him off in favor of a less senior employee and deprived him of his daily wage, a wage that was subsequently ordered to be paid by an arbitrator.

Each employee in this consolidated case rendered services to the employer expecting to receive agreed-upon wages, wages that are required to be paid under the Wage Payment and Collection Act. Each employee was wrongfully denied his wages, and was forced to resort to legal action to collect those wages.

The majority opinion unfairly denies the employees their right to a remedy under the Wage Payment and Collection Act. I therefore respectfully dissent.

I am authorized to state that Justice McGraw joins in this dissent.