No. 27831- Robert S. Rhodes v. Workers' Compensation Division and Anchor Glass Container

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RORY L. PERRY II, CLERK
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OF WEST VIRGINIA

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Scott, J., concurring:

In a continuing trend by some members of this Court to politicize the nature of the judicial process to the ultimate detriment of the citizens and the State, the dissenting opinion advances a position in this case that would literally bankrupt the fund earmarked for occupational pneumoconiosis (OP) claims. I am dismayed by the dissenting opinion's distortion of the applicable law. As I more fully outline below, the majority decision in this case simply provides a judicial rule to bolster a procedure that employees and employers have consistently followed in Workers' Compensation litigation. It does not add any real burden to any party.

I.

OP Claims Procedure

The majority opinion correctly notes that when an OP claim is made, the Workers' Compensation Division (Division) must submit the claim to the Occupational Pneumoconiosis Board (OP Board). The OP Board is then charged with making a determination regarding the claim. The OP Board submits its findings and conclusions to the Division. The Division is thereafter required to make its determination of the claim based upon the OP Board's report. *See* W. Va. Code § 23-4-6(h) (Supp. 2000) ("For the purposes of [Chapter 23 of the West Virginia Code] a finding of the occupational pneumoconiosis board shall have the force and effect of an award.").

If any party objects to the OP Board's decision, as embodied in the Division's subsequent order, W. Va. Code § 23-4-8c(d) (1998)[1] *mandates* that a hearing be held before the Office of Judges for the purpose of questioning the OP Board members. The Office of Judges is *required*, under § 23-4-8c(d), to schedule a hearing, and the members of the OP Board who join in the conclusions of the Board "shall appear" at such hearing. While § 23-4-8c(d) does not expressly obligate a protesting party to question the OP Board, the statute does state that the evidence for and against the findings of the Board "shall be limited to examination and cross-examination of the members of the Board" and the testimony of other qualified physicians. It has always been the common practice for the protesting party to question

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[1]W. Va. Code § 23-4-8c(d) (1998) states:

> If either party objects to the whole or any part of such findings and conclusions of the board, such party shall file with the commissioner or, on or after the first day of July, one thousand nine hundred ninety-one, with the office of judges, within thirty days from receipt of such copy to such party, unless for good cause shown, the commissioner or chief administrative law judge extends such time, such party's objections thereto in writing, specifying the particular statements of the board's findings and conclusions to which such party objects. The filing of an objection within the time specified is hereby declared to be a condition of the right to litigate such findings and hence jurisdictional. After the time has expired for the filing of objections to the findings and conclusions of the board, the commissioner or administrative law judge shall proceed to act as provided in this chapter. If after the time has expired for the filing of objections to the findings and conclusions of the board no objections have been filed, the report of a majority of the board of its findings and conclusions on any medical question shall be taken to be plenary and conclusive evidence of the findings and conclusions therein stated. *If objection has been filed to the findings and conclusions of the board, notice thereof shall be given to the board, and the members thereof joining in such findings and conclusions shall appear at the time fixed by the commissioner or office of judges for the hearing to submit to examination and cross-examination in respect to such findings and conclusions. At such hearing, evidence to support or controvert the findings and conclusions of the board shall be limited to examination and cross-examination of the members of the board*, and to the taking of testimony of other qualified physicians and roentgenologists. (Emphasis Added).

members of the OP Board. Quite simply, it is the only way in which the mandatory requirement that a hearing be held can be fulfilled, and it is the only sure way that a protesting party can demonstrate that the OP Board's findings are wrong. Our system recognizes that cross-examination is the surest path to the truth.

In this case, the employee protested the OP Board's findings and the mandatory hearing was scheduled. The OP Board was present but its members were not questioned and the case was submitted without the benefit of the OP Board's comments on the claimant's new medical evidence. Thus, the claimant/protestant attempted to defeat the mandatory requirement of W. Va. Code § 23-4-8c(d) that a hearing be held and that the evidence be concentrated around the opinions of the members of the Board whose decision is under protest. Because such a hearing is mandatory, the majority could have required the Division, or the non-protesting party, to advance the hearing by questioning the OP Board. Instead, the majority opinion took the practical approach and adopted a procedure that employees and employers have heretofore utilized, i.e., requiring the protesting party, be it the employee or the employer, to question the Board. In other words, pursuant to the statutory process, the majority opinion simply requires that the party who protests an OP Board's decision to the Office of Judges sees to it that the hearing goes forward. Materially, this ruling changed nothing in Workers' Compensation law. It added no burden to any party to the proceeding. The dissent's assertion otherwise is wrong.

II.

The Dissenting Opinion Would Bankrupt the OP Fund

Should the dissenting opinion be adopted by this Court the result is crystal clear. The mere filing of a claim would reap OP benefits 100% of the time.[2] The majority seeks to justify this disastrous approach by relying on the decision in *Javins v. Workers' Compensation Commissioner*, 173 W. Va. 747, 320 S.E.2d 119 (1984).

The dissenting opinion has done a great disservice to Workers' Compensation law by its mischaracterization of *Javins*. According to the dissenting opinion, since no evidence in this case contradicted the employee's evidence of 5% OP impairment, "under *Javins*, 'medical evidence indicating the highest degree of impairment'--5% in this case--should have been adopted to support an award for the claimant." Such a misapplication of *Javins* is unfortunate. By allowing the submission of a claim without a proper hearing, the dissent seeks to circumvent a procedure the Legislature deemed mandatory, and would prevent the Office of Judges from having a complete and adequate record upon which to base its final decision.

A proper application and correct analysis of *Javins* requires this Court to do *exactly* what the majority opinion did--remand for a hearing so that the OP Board may review the claimant's new evidence. In fact, Syllabus Point 1 of *Javins* states "that medical evidence indicating the highest degree

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[2]The dissent is fully aware that in statutory OP claims the Division has no "interest" and therefore never appears by counsel in such litigation before the Office of Judges, the Workers' Compensation Appeal Board or this Court. The dissent is further aware that in the vast majority of statutory OP claims the employer no longer exists. Because the dissent is aware of these facts, it knows that its position would subject the OP fund to wholesale raiding. I am truly disheartened by the thought of "unlawfully" opening the State's coffers by such misconstruction of a plain statute.

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." (Emphasis added.)

Javins recognizes that the OP Board has a duty to comment upon new OP evidence submitted by a party. However, the dissenting opinion seeks to ignore the plain language in *Javins* which recognizes the Legislative requirement that a protesting party present its new evidence to the OP Board. Instead, the dissenting opinion suggests that under *Javins* a full hearing is not required. To the contrary, *Javins* clearly states that once the OP Board has fulfilled its statutory duty of examining new evidence submitted by a party, and concludes that such evidence is not "unreliable, incorrect, or clearly attributable to some other identifiable disease or illness," then the medical evidence indicating the highest degree of impairment is presumed to reflect the claimant's level of pulmonary impairment. The Board's duty in this regard could not be fulfilled without a full hearing.

Finally, the crux of the position taken by the dissent results in automatic entitlement. Obviously, if the OP Board is denied the opportunity to comment upon the new evidence submitted by a claimant, under *Javins* the employee's evidence must *always* prevail. In essence, any employee who files a claim, protests, and then submits his or her new evidence without allowing for OP Board comment, will be awarded benefits. Employees who want to hit the "jackpot" just need to file a claim. The dissent's reality for West Virginia is a bankrupt OP fund. The sad truth is, the dissenters do not care.

I concur with the majority opinion.