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

Starcher, J., dissenting:

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Professor Larson, in his treatise on workers' compensation law, recognized that medical evidence is more of an "art" than a "science" in the context of occupational diseases. This is one of the reasons that workers' compensation agencies and courts have tended to relax substantive, evidentiary requirements in occupational disease cases. Professor Larson states that:

> [I]n appropriate circumstances medical testimony need not necessarily establish specifically and positively the pathological diagnosis and etiology of a disease or condition. . . .
>
> The advent of a large volume and variety of occupational -- and particularly respiratory -- diseases whose etiology ranges from the imperfectly-understood to the downright mysterious has begun to precipitate questions on the extent to which awards can be based on incomplete medical evidence as to the nature and causation of the disease . . . [I]f the physical causal sequence is sufficiently impressive, the lack of precise diagnosis or etiology can be excused.

Arthur Larson and Lex K. Larson, 7 *Larson's Workers' Compensation Law* § 128.02[2], [4] [2000]. Professor Larson also suggests that the procedural rules employed in workers' compensation claims should be relaxed, summary and informal, so as to reach a decision by the shortest and quickest route possible:

> The procedural law of workers' compensation, like the substantive, takes its tone from the beneficent and remedial character of the legislation. Procedure is generally summary and informal. . . . The whole idea is to get away from the cumbersome procedures and technicalities of pleading, and to reach a right decision by the shortest and quickest possible route.

7 *Larson's Workers' Compensation Law* § 124.01. Professor Larson's conclusions were drawn from an analysis of hundreds of workers' compensation cases litigated worldwide over the last century

The majority opinion ignores the fundamental assumption that the etiology of occupational pneumoconiosis "ranges from the imperfectly-understood to the downright mysterious," and begins with the premise that the Occupational Pneumoconiosis Board ("OP Board") is statutorily endowed with unquestionable infallibility in deciding questions regarding lung diseases. The majority opinion then goes on to create a new rule of procedure which forces the parties to engage in expensive, though likely fruitless, litigation.

I dissent to the majority opinion's creation of a new rule of procedure, which is supported neither by law nor reason, that suggests that a diagnosis of occupational pneumoconiosis can only be established with absolute, scientific precision by the OP Board -- and that any opinion contrary to the OP Board's opinion is unreliable until approved by the Board itself. The rule abrogate 87 years of jurisprudence regarding how evidence is to be interpreted in workers' compensation claims, and creates a rule of procedure biased solely against the party with the burden of proof -- that is, claimants.

This entire case centers on opposing interpretations of one x-ray film by several doctors. The OP Board -- a panel of physicians hired to provide advice to the Workers' Compensation Commissioner -- took an x-ray film of the claimant's chest on September 24, 1998. The radiologist for the OP Board examined the x-ray films and found no evidence of occupational pneumoconiosis.

The claimant procured the x-ray film from the OP Board, and sent it to two different radiologists for an independent review. Dr. Ray A. Harron read the x-ray and found abnormalities in the lungs that appeared consistent with occupational pneumoconiosis. Dr. Edward Aycoth similarly read the

x-ray and found what appeared to be "scattered rounded density opacities measuring up to 3 mm. in diameter throughout both lungs," suggesting a mild degree of occupational pneumoconiosis.

"Occupational pneumoconiosis is 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 [1989]. A pneumoconiosis -- such as asbestosis, silicosis, or black lung -- is the irritation and scarring of the tissue of the lungs and the tissue surrounding the lungs caused by breathing in certain irritating dusts -- such as asbestos, silica, or coal. The inflammation and scarring process is sometimes -- though not always -- visible through the use of x-ray films of the chest.

Reading an x-ray of the lungs is similar to reading a Rorschach test -- different doctors look at blotches (called "opacities") on x-rays and try to measure and interpret what the blotches mean. One doctor may interpret a blotch as occupational pneumoconiosis, while another might feel the blotch is the remnant of a childhood disease. A third doctor may interpret the blotch as normal, healthy lung tissue. Only by slicing the claimant's lung into sections and examining the tissue under a microscope can an exact diagnosis be achieved -- a procedure obviously not available to living claimants.

The reading of lung x-rays is therefore *very* subjective. Doctors are looking at spots and squiggles on x-rays trying to pigeonhole the spots into categories, so that the diagnosis can be conveyed in a way another doctor could understand. In the instant claim, the doctors reached two different diagnoses looking at opacities on the same x-ray. I found no evidence in the record to suggest that either interpretation was in any way unreliable.

Our rule when the opinions of doctors are in conflict is quite simple: "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). We made clear in Syllabus Point 1 of *Javins* that when conflicting medical evidence is presented concerning the existence or 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."

The instant case could have easily been resolved through the application of *Javins* by the Office of Judges, by the Workers' Compensation Appeal Board, or by the majority opinion. The OP Board interpreted its September 24, 1998 x-ray as showing no occupational pneumoconiosis. The claimant's doctors interpreted the x-ray as positively showing occupational pneumoconiosis, supporting a statutory 5% permanent partial disability award. Neither medical opinion was shown "to be unreliable, incorrect, or clearly attributable to some other identifiable disease or illness" by the OP Board, the Office of Judges or the Appeal Board. Hence, under *Javins*, "that medical evidence indicating the highest degree of impairment" -- 5% in this case -- should have been adopted to support an award for the claimant.

Instead of applying this simple principle of law, the majority opinion created a new twist to the procedures that are to be used in occupational pneumoconiosis claims.[1] The majority opinion finds that because the claimant "failed" to question the OP Board, his evidence could be ignored by the Office of Judges.

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[1]The majority opinion created this new procedural rule without any briefing from the claimant on the issue, and without the employer or the Division even making an appearance in the appeal.

First, the regulations make clear that the Office of Judges must make its decision based solely upon the evidence and testimony that the parties choose to introduce into the record:

> . . . the record upon which a protest shall be decided shall include evidence submitted by a party *to the Office of Judges*, evidence taken at hearings conducted by the Office of Judges and any documents in the Division's claim files which relate to the protest.

93 C.S.R. § 1.2.3(e) (emphasis added). In the instant claim, already "in the Division's claim files" was a "document[] . . . which relate[s] to the protest:" the OP Board's report to the Commissioner finding no evidence of occupational pneumoconiosis. The claimant then submitted to the Office of Judges evidence in the form of a report by Dr. Ray A. Harron and another report by Dr. Edward Aycoth, both finding evidence of occupational pneumoconiosis. The Office of Judges could have, and should have, made its decision solely upon this record, as its own regulations require.

Second, there is no statute or regulation I can find suggesting that the Office of Judges can reject evidence, as it did in this case, because a party declined to solicit testimony from an opposing, likely hostile witness about the evidence. I don't see how the claimant "failed" to question the OP Board, because I find no requirement in our law mandating that the OP Board be questioned about the claimant's evidence. Nowhere do the statutes or regulations quoted by the majority opinion require that the OP Board be questioned about a party's evidence.

The only statute making any mention that the OP Board submit to questioning is *W.Va. Code*, 23-4-8c(d), which specifically requires the OP Board to appear for questioning *about its own opinions*. A plain reading of the statute reveals nothing about questioning the OP Board *about the opinions of other witnesses*. The statute states, in part:

> If objection has been filed to the findings and conclusions of the board . . . 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.

The majority opinion interprets the language of this statute to mean that the OP Board is not only required to submit to examination and cross-examination in respect to the findings and conclusions of the OP Board, it must also submit to examination and cross-examination in respect to the findings of the claimant's experts and the employer's experts. This interpretation adds new language to the statute.

Nowhere in *W.Va. Code*, 23-4-8c(d) does the statute require that the claimant or employer submit their evidence to the OP Board for commentary. In fact, the statute specifically prevents the parties from wasting the OP Board's time by doing anything other than questioning the OP Board or other medical witnesses. The statute continues:

> 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.

This portion of the statute contains language of limitation, not language mandating action. The parties can do nothing at the hearing other than question the OP Board, or question other doctors, regarding the claim. The statute does not -- repeat, does not -- require the parties to produce their expert medical witnesses for testimony at the hearing. It also does not require the parties to question the OP Board regarding any particular piece of evidence.

Reading the language of *W.Va. Code*, 23-4-8c(d) plainly, it is obvious that the statute exists as a way to preserve the due process rights of participants in the workers' compensation system.

The Commissioner and Division cannot rely upon medical advice provided by an unknown, phantom expert operating in the shadows. Due process requires that there be some mechanism whereby the parties affected by the medical advice can question the provider. The mechanism in occupational pneumoconiosis cases is *W.Va. Code*, 23-4-8c(d). The statute mandates that the Commissioner produce his/her expert, the OP Board, for questioning, and nothing more. The parties can question the OP Board regarding its report to the Commissioner if they choose -- but are not required to do so -- and cannot waste the OP Board's time by litigating other questions.[2]

By creating this new, unnecessary rule of procedure, the majority opinion has unfairly complicated the resolution of workers' compensation claims in violation of the basic principles of workers' compensation law. *W.Va. Code*, 23-1-15 [1923] states that:

> 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 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." *Thacker v. Workers' Compensation Division*, 207 W.Va. 241, ___, 531 S.E.2d 66, 69 (1999)(*per curiam*). 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

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[2]For instance, the parties could not litigate the question of the chargeability of an employer for a claim before the OP Board -- unless the chargeability questioned hinged upon medical testimony within the OP Board's expertise.

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).

For over 87 years, the Legislature and this Court have emphasized that the Division is required to adopt simple rules of procedure. Professor Larson's treatise, quoted earlier, indicates that most jurisdictions follow this rule of informality. Now, the majority opinion has created a rule which ignores these precedents, complicates the procedure in occupational pneumoconiosis cases, and places an unfair burden primarily upon claimants.

In the instant claim, no one showed up at the OP Board hearing to represent the employer and no one showed up to represent the Division -- yet the majority opinion absurdly mandates that the claimant was still required to present *his* evidence to the OP Board and solicit criticism of his own experts' reports. The majority opinion doesn't say "criticism" -- it says the party "bears the burden of establishing that his/her new evidence is reliable and demonstrates that the findings and conclusions of the OP Board are clearly wrong" -- but the majority opinion might as well say "criticism." To say anything else would defy a knowledge of the history of the OP Board.

The Commissioner hires the OP Board to give the Commissioner its expert opinion of whether the claimant has occupational pneumoconiosis. The claimant and the employer hire their own experts to give different opinions. But these competing medical opinions cannot be presented to the Office of Judges -- who take the administrative place of both judge and jury -- without the OP Board first being consulted to "approve" of a particular opinion, and more importantly, being asked to admit that it was "clearly wrong." It goes against reason -- and the due process protections provided by the *Constitution*

-- to suggest that the OP Board must act as both judge and jury regarding whether a party's evidence proves to the Office of Judges that the OP Board's opinion was incorrect.

Lastly, the majority rule is cast as an even-handed rule affecting both claimants and employers. However, in practice, the impact of the rule falls almost exclusively upon claimants, because the OP Board has an unwritten rule that occupational pneumoconiosis causes permanent, irreversible, and unchanging impairment. If a claimant is tested twice, and one test shows low impairment and another test shows high impairment, the OP Board concludes that the claimant has the low degree of impairment. The OP Board reasons that the difference between the low and high degree of impairment must have been the result of non-occupational causes (like asthma or some other, elusive "bronchospastic disease").

The majority opinion's rule falls more heavily on claimants because claimants bear the burden of proving that the claimant suffers from a percentage of impairment higher than that found by the OP Board. Under the OP Board's unwritten rule that the lowest degree of impairment is always correct, and higher degrees of impairment must be the result of non-occupational causes, the claimant can almost never win. Even if the claimant has hired a dozen doctors who say in sworn affidavits that the claimant's higher test results are reliable and accurate, if the OP Board decides to say the test results are not reliable -- well, then the claimant loses.[3] If the claimant's evidence doesn't change the OP Board's opinion, again,

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[3]Experience reading the records of the thousands of workers' compensation cases presented to this Court on appeal indicates that the OP Board is a slippery eel which refuses to be pinned down.

For example, medical treatises often state that "rales" or "crackling" sounds in a patient's lungs is suggestive of permanent, irreversible occupational pneumoconiosis. The members of the OP Board, however, take the unwritten position that rales are evidence of an undefined "bronchospastic disease" caused by non-occupational sources (like asthma, a chest cold, or smoking).

If the OP Board finds rales in its examination, it often attributes any of the claimant's breathing

(continued...)

the claimant loses. The OP Board gets to be judge and jury of its own opinions and any evidence which conflicts with its opinions.

Conversely, the employer can much more easily afford to repeat the tests performed by the OP Board. If the results show a lower percentage of impairment, the OP Board usually takes the position that the employer's tests are "more reliable" and therefore changes its opinion to reflect the lower percentage of disability. *See Thacker v. Workers' Compensation Division*, 207 W.Va. 241, 531 S.E.2d 66 (1999) (*per curiam*) (OP Board found 15% impairment, but later reduced award to 5% impairment finding the employer's test evidence showing lower impairment to be "the most reliable and accurate study.")[4] Again, the OP Board relies upon its unwritten -- and under *Javins*, illegal -- theory that the medical tests showing the least degree of impairment are presumed to be correct.

The result of the majority opinion's new rule is that claimants have an almost impossible task of getting the OP Board to both declare that the claimant's evidence is reliable and declare that the OP Board was wrong. Employers, meanwhile, can repeat the OP Board's test to come up with a "more reliable," lower degree of impairment, or introduce some other medical records which might suggest to the

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[3](...continued)
impairment to non-occupational causes other than pneumoconiosis -- meaning the claimant gets no award. If the claimant's doctor does an examination and finds rales, and then imputes the rales to occupational pneumoconiosis, the OP Board can find the doctor's opinion is unreliable because it conflicts with the OP Board's unwritten medical theories. Conversely, if the claimant's doctor finds no rales in a clinical examination, then the OP Board will declare that the claimant's doctor has proven the OP Board's point that the claimant has a disease which "comes and goes" -- like asthma -- and that the OP Board's conclusion that the claimant has no occupational pneumoconiosis is correct and the doctor's opinion is incorrect and unreliable.

[4]Interestingly, the OP Board usually changes its opinion because it finds that the employer's tests are "more reliable" -- not because the OP Board finds its first opinion was "clearly wrong." I fail to understand how the Office of Judges can tolerate this discrepancy.

OP Board that the claimant's impairment is caused by something other than occupational pneumoconiosis. In sum, it is now easier to reduce than it is to increase an occupational pneumoconiosis award.

I therefore respectfully dissent to the majority's opinion.

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