

No. 28516 -- Juanita Martin, widow of Dana Martin, deceased v. Workers' Compensation Division and W-P Coal Company

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OF WEST VIRGINIA

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RORY L. PERRY II, CLERK
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Maynard, Justice, dissenting:

The majority opinion has no basis in our law and violates the principles of *stare decisis*.

Because the workers' compensation system is a statutory creation, this Court should look to the applicable workers' compensation statute to decide issues like the instant one. "Workers' Compensation rights and resultant remedies are statutory and in order to ascertain the availability and scope of benefits, this Court looks to the plain meaning to ascertain the legislature's intention." *Wingrove v. Workers' Compensation Div.*, 208 W.Va. 80, 84, 538 S.E.2d 378, 382 (2000). "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syllabus Point 1, *Smith v. State Workmen's Compensation Com'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975).

The applicable statute at issue is W.Va. Code § 23-4-6(g) (1999). This Court recognized in *Wingrove* that "[a]ccording to W.Va. Code 23-4-6(g) [1999], the general rule is that an award of benefits during the lifetime of the claimant is necessary for payment of unpaid benefits to a claimant's dependents after his or her death." *Wingrove*, 208 W.Va. at 85, 538 S.E.2d at 383 (citation omitted). We made it quite clear in *Wingrove* that "[t]he plain meaning of the statute requires an award to be given

during a claimant's lifetime for the payment of unpaid benefits to a claimant's dependents after his or her death." *Id.*

In the instant case, no award was given during the claimant's lifetime so that, according to the unambiguous rule set forth in *Wingrove*, there can be no payment of unpaid benefits to the claimant's dependents after his death. In this case, because the claimant died without ever having received an award, the claim was extinguished upon his death. The applicable statute and the settled law of this Court are clear. Therefore, this Court should apply the statute and our rule in *Wingrove* and find against the claimant.

However, the majority does not like the result mandated by application of the established law. Therefore, the majority chooses to ignore the plain terms of the statute and to overrule a unanimous opinion of this Court which was decided on July 12, 2000, a mere year and a half ago. I believe that this Court should be bound by the doctrine of *stare decisis* to follow *Wingrove*. The doctrine of *stare decisis* rests on the principle,

that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority.

Booth v. Sims, 193 W.Va. 323, 350 n. 14, 456 S.E.2d 167, 194 n. 14 (1995) (citation omitted).

Wingrove is well reasoned, devoid of palpable mistake or error, and the applicable governing statute has not changed since *Wingrove* was decided. Therefore, there is no sound reason to overrule *Wingrove*.

Furthermore, the Court's disposition of the claimant's permanent total disability claim and the new law set forth in syllabus point 7 are wrong. Although this Court regularly refers to *Javins v. Workers' Compensation Com'r*, 173 W.Va. 747, 320 S.E.2d 119 (1984) and *Persiani v. SWCC*, 162 W.Va. 230, 248 S.E.2d 844 (1978), these cases are no longer good law in light of the 1995 amendments to the workers' compensation statutes. According to W.Va. Code § 23-4-6a (1995), in part:

If an employee is found to be permanently disabled due to occupational pneumoconiosis . . . the percentage of permanent disability shall be determined by the degree of medical impairment that is found by the occupational pneumoconiosis board. The division shall enter an order setting forth the findings of the occupational pneumoconiosis board with regard to whether the claimant has occupational pneumoconiosis and the degree of medical impairment, if any, resulting therefrom. That order shall be the final decision of the division. . . . If such a decision is objected to, the office of judges shall affirm the decision of the occupational pneumoconiosis board made following hearing unless the decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record.

The dispositive question, therefore, is whether the Occupational Pneumoconiosis Board was clearly wrong in light of the reliable, probative and substantial evidence on the whole record. The answer is unequivocally no. Dr. Ranavaya's opinion that the claimant was permanently and totally disabled as a result of his occupational pneumoconiosis does not constitute reliable, probative, and substantial evidence that renders the Occupational Pneumoconiosis Board clearly wrong.

The majority opinion is another example of this Court's results-driven workers' compensation jurisprudence. First, the Court regularly abuses the applicable standards of review. Although the Court repeatedly asserts that it only disturbs the findings of the Workers' Compensation

Appeal Board when these findings are clearly wrong, the Court, in fact, reviews *de novo* every workers' compensation appeal accepted by the Court and reverses the Board a significant percentage of the time.

Second, the Court routinely abrogates legislative mandates by resorting to the so called "rule of liberality" which was created *ex nihilo* by this Court. While arguably application of a liberality rule is warranted where the parties' evidence is evenly balanced, this Court regularly abuses the rule to find for the claimant where his or her evidence is grossly inadequate. For example, this Court will choose a chiropractor's percentage of impairment evaluation over the evaluations of five orthopedic surgeons based on the liberality rule.

According to the "Workers' Compensation Training Manual" promulgated by the Workers' Compensation Division, "[t]he Liberality Rule is something of which you should be aware. It is **not** something you should routinely resort to in justifying an award of benefits. In fact, citations to the rule should **almost never** be included in your decisions." Further, "[i]t is important to emphasize that the Liberality Rule is no substitute for proof of entitlement to workers' compensation benefits." This Court, however, routinely cites the liberality rule and uses it to justify its decisions in workers' compensation appeals.

By ignoring plain statutory language, disregarding standards of review, and abusing the liberality rule, this Court usually manages some way to find for claimants, often contrary to the reliable

evidence. “It is not good to have respect of persons in judgment.”¹

In conclusion, I would have applied W.Va. Code § 23-4-6(g) (1999) and *Wingrove* to find that Mr. Martin’s claim was extinguished by his death because he did not previously receive any favorable rulings. Accordingly, I dissent.

¹*Proverbs* 24:23, in part. (King James Version).