No. 28678 - Betty J. Plummer v. Workers' Compensation Division and B.F. Goodrich Company

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OF WEST VIRGINIA

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Davis, J., dissenting:

This case presented a straight forward issue concerning whether the appellant, Betty J. Plummer, established good cause for introducing evidence in her workers' compensation case after the expiration of a time frame order entered by an administrative law judge. The majority opinion has ruled that good cause was shown. In rendering this decision, the majority opinion has effectively reduced the meaning of "good cause" to any explanation proffered. I do not subscribe to this de minimis standard. I, therefore, dissent from the majority opinion in this case.

The majority opinion correctly points out that under the applicable administrative rules, the parties had to request an extension of the time frame order thirty days before the time frame expired. Ms. Plummer and the employer, B. F. Goodrich Company, did in fact make a joint motion for an extension of the initial time frame order within the thirty day limit. Thus, the administrative law judge appropriately granted the first extension.

Thereafter, Ms. Plummer sought a second extension of the time frame order, for the purpose of submitting additional evidence. Unlike the first request for an extension of the time frame order, however, Ms. Plummer's second request was made *after* the time frame order had expired. Under this

scenario, the administrative rule required Ms. Plummer to show good cause for failing to timely request an extension of the time frame order. The administrative law judge and the Workers's Compensation Appeal Board found that Ms. Plummer did not show good cause. The majority opinion in this case disagreed with the lower tribunals. I believe the majority opinion is wrong for two reasons: (1) good cause was not shown by Ms. Plummer, and (2) the wrong standard of review was used.

A. Good Cause was not Demonstrated in this Case

Counsel for Ms. Plummer has indicated that a timely request for an extension of the time frame order was not made because counsel was occupied with obtaining social security benefits for Ms. Plummer. The majority opinion has found that this was good cause. I disagree. This explanation constituted nothing more than an attorney's failure to follow a time frame order.

Good cause is necessarily fact specific. Consequently, no rigid rule should be crafted to determine good cause. I do believe, however, that a threshold exists for what may be considered good cause. The "'good cause' requirement . . . 'is not a mere formality.'" *State ex rel. Letts by Letts v. Zakaib*, 189 W. Va. 616, 618, 433 S.E.2d 554, 556 (1993) (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 118, 85 S. Ct. 234, 242, 13 L. Ed. 2d 152 (1964)). Establishing good cause "puts the burden on the party seeking relief to show some *plainly adequate* reason therefor[,]" not merely *any reason*. *AT&T Communications of West Virginia, Inc. v. Public Serv. Comm'n of West Virginia*, 188 W. Va. 250, 253, 423 S.E.2d 859, 862 (1992) (emphasis added). Our jurisprudence has long "held that . . . 'good cause can only appear by showing . . . some . . . circumstance beyond the control of the party,

and free from neglect on his part.'" *Winona Nat'l. Bank v. Fridley*, 122 W. Va. 479, 481, 10 S.E.2d 907, 908 (1940) (quoting Syl. pt. 1, *Post v. Carr*, 42 W. Va. 72, 24 S.E. 583 (1896)). By permitting an attorney's failure to comply with a time frame order to constitute good cause, the majority opinion has effectively rendered good cause meaningless. *See Dimon v. Mansy*, 198 W. Va. 40, 47, 479 S.E.2d 339, 346 (1996) ("The plaintiff's proffer of good cause establishes a standard that would do away with this requirement.").

As we said in *Taylor v. Smith*, 171 W. Va. 665, 667, 301 S.E.2d 621, 624 (1983), "[t]he law aids those who are diligent, not those who sleep upon their rights." Ms. Plummer slept on her rights. This new and intolerable standard will make it impossible for administrative law judges to control their dockets and render timely decisions, because litigants will be able to indefinitely introduce additional evidence and extend litigation by simply saying "I was busy doing something else."

B. The Wrong Standard of Review was Applied.

The majority opinion in this case applied the clearly wrong standard of review to the ultimate conclusion reached by the lower tribunals. The proper standard for our review of the ultimate disposition of this case by the lower tribunals is the abuse of discretion standard. *See* Syl. pt. 2, *Willard v. State Workmen's Comp. Comm'r*, 155 W. Va. 114, 181 S.E.2d 278 (1971) ("Consideration of a medical report in support of an application to reopen a claim for workmen's compensation . . . is in the sound discretion of the Workmen's Compensation Appeal Board and its ruling in refusing to consider the medical report . . . will not be disturbed by this Court on appeal unless it clearly appears that such action

constituted an abuse of discretion."); Syl. pt. 2, in part, *State ex rel. Shorter v. Hey*, 170 W. Va. 249, 294 S.E.2d 51 (1981) ("The determination of what is good cause . . . is in the sound discretion of the trial court[.]").

The "clearly wrong"[1] standard of review is applicable to findings of fact. In this case, there was no dispute as to any of the relevant facts. That is, there was no dispute that Ms. Plummer failed to timely file a request for an extension of the time frame order. The contestable issue in this case concerned whether or not Ms. Plummer established good cause in failing to make a timely request for an extension of the time frame order. The lower tribunals found that the reason proffered did not constitute good cause, and therefore denied submission and consideration of the late evidence. The majority opinion applied the clearly wrong standard of review to this disposition in order to impose the result it sought to reach. Our cases have made clear that "[w]here the law commits a determination to a [lower tribunal] and [its] discretion is exercised with judicial balance, the decision should not be overruled unless the reviewing court is actuated, not by a desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed." *Intercity Realty Co. v. Gibson*, 154 W. Va. 369, 377, 175 S.E.2d 452, 457 (1970) (citation and internal quotations omitted). Nothing in the majority opinion points to an abuse of discretion by the lower tribunals. There was no abuse of discretion.

[1]Our cases use "clearly wrong" and "plainly wrong" interchangeably. *See Conley v. Workers' Comp. Div.*, 199 W. Va. 196, 199 n.5, 483 S.E.2d 542, 545 n.5 (1997) ("It will be noted that our cases have used the term[s] 'clearly wrong' and 'plainly wrong' interchangeably.")

For the reasons stated, I respectfully dissent. I am authorized to state that Justice Maynard joins me in this dissenting opinion.