No. 29543 – *Jasper A. Blackburn v. Workers' Compensation Division and Marrowbone Development Company*

FILED
December 11, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
December 13, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, concurring in part, and dissenting in part:

I respectfully dissent from the portion of the majority opinion formulating temporary rules for determinations of awards in Workers' Compensation hearing loss cases. While I do not necessarily disagree with the substance of the rules formulated by the majority, I believe that this Court has exceeded its authority by engaging in what is essentially a rule-making function, regardless of the fact that such rules are intended as only interim rules. A complex system exists within this State for the consideration and promulgation of rules within the Workers' Compensation realm. The West Virginia Legislature has clearly articulated that rule-making authority rests within administrative and legislative bodies, rather than this Court. As this Court aptly recognized in footnote five of *Chico Dairy Co., Store No. 22 v. West Virginia Human Rights Commission*, 181 W.Va. 238, 382 S.E.2d 75 (1989), "[s]everal sections of the State Administrative Procedures Act, as amended effective May 11, 1982, state the legislature's concerns with the manner in which the rules of state administrative agencies are promulgated, emphasizing legislative oversight of rules which are legislative in character." 181 W.Va. at 243 n. 5, 382 S.E.2d at 80 n. 5.

In addition, the Legislature has placed within the workers' compensation scheme a particularized process for the development and promulgation of rules relating to that subject. *See* W.Va. Code § 21A-3-7(c) (1993) (Repl. Vol. 2002). This Court possesses only limited powers to make rules regulating the judiciary and legal profession, as contemplated by West Virginia Constitution, Article VIII, § 8. *See Gilman v. Choi*, 185 W.Va. 177, 406 S.E.2d 200 (1990), overruled on other grounds, *Mayhorn v. Logan Medical Found.*, 193 W.Va. 42, 454 S.E.2d 87 (1994). The majority's development of rules for determining permanent partial disability awards based upon audiograms, while perhaps well-intentioned and designed, simply exceeds the authority of this Court. To remain within the confines of this Court's authority, the majority should have limited itself to a basic recitation of the issues to be considered in agency rule-making action and the establishment of a firm deadline for such action.

This Court improvidently entered this arena in *Bilbrey v. Workers' Compensation Commissioner*, 186 W.Va. 319, 412 S.E.2d 513 (1991), and created the dilemma of judicial intervention in areas more properly addressed by administrative and legislative bodies. I agree with the majority in the case sub judice that the principles of *Bilbrey* have been administered in such manner as to create no reliability in hearing loss awards. I further agree with the majority that additional guidelines do need to be developed by the Workers' Compensation Division to address the areas discussed in the majority opinion regarding reliability of audiograms.

Rule of Liberality

I also write separately to reiterate and reemphasize that the Rule of Liberality, as consistently implemented by this Court, is not merely a rule of liberal construction of a statute; it also addresses the weight to be given to evidence provided by the claimant. The origin of the "liberality rule" can be traced to the first Workmen's Compensation Act, Acts of the Legislature, 1913, chapter 10, § 44, as follows:

> Such commission shall not be bound by the usual common law or statutory rules of evidence, or by any technical or formal rules of procedure, other than herein provided, but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to *carry out justly and liberally the spirit of this act.*

See Johnson v. State Workmen's Compensation Com'r, 155 W.Va. 624, 631-32, 186 S.E.2d 771, 776 (1972). This Court acknowledged the spirit of workers' compensation legislation prior to the 1913 legislative pronouncement. In 1910, this Court explained: "That which is plainly within the spirit, meaning and purpose of a remedial statute, though not therein expressed in terms, is as much a part of it as if it were so expressed." Syl. Pt. 1, *Hasson v. City of Chester*, 67 W.Va. 278, 67 S.E. 731 (1910). Judicial recognition of this principle also occurred in1928 in *Caldwell v. Compensation Commissioner*, 106 W.Va. 14, 144 S.E. 568 (1928), in which this Court held that a spirit of liberality should be employed in applying the *provisions* of the Workmen's Compensation Act.

In *Machala v. State Compensation Commissioner*, 109 W.Va. 413, 155 S.E. 169 (1930), the rule was extended to the construction and interpretation of *evidence*. In that regard, our law differs from that of other states. But the application of the rule of liberality to the consideration of evidence has now been so firmly established in our law for over seventy years as to be beyond question or doubt. Very importantly, however, the Rule of Liberality is not to be utilized as a *substitute* for the claimant's duty to produce substantial evidence of the claim. In syllabus point one of *Hoff v. State Compensation Commissioner*, 148 W.Va. 33, 132 S.E.2d 772 (1963), overruled on other grounds, *Brogan v. Workers' Compensation Commissioner*, 174 W.Va. 517, 327 S.E.2d 694 (1984), this Court emphatically advised:

> Although the liberality rule in the interpretation of evidence in Workmen's Compensation cases is approved by this Court, the burden of establishing a claim for compensation rests upon the person asserting such claim. The rule of liberality will not take the place of required proof, and an award of compensation cannot be made on hearsay alone.

See also Eady v. State Compensation Com'r, 148 W.Va. 5, 12, 132 S.E.2d 642, 646-47 (1963). Thus, the liberality rule must be balanced against the ultimate responsibility of this Court and administrative bodies to assure that awards are founded upon substantial evidence.

In summary, I concur with the majority's perception of the degree to which determinations of hearing loss awards are not uniformly managed. I further concur with the majority's vision of the manner in which determinations of such awards, through appropriate rule-making authority, should be altered. I respectfully dissent, however, with regard to this

Court's determination that it has the authority to fabricate interim rules for application while the system awaits agency response to this Court's mandate. I would have set a reasonable deadline for administrative correction of the defects in reliability recognized by the Court and acknowledged, on grounds of comity, the need for judicial restraint until and unless judicial intervention became unavoidable by reason of administrative inaction.