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

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Starcher, Justice, concurring:

Justice Neely once stated that, "All tests are performed by men and women who are subject to human error, philosophical predisposition, and even, occasionally, unimaginative cupidity." *Persiani v. SWCC*, 162 W.Va. 230, 236, 248 S.E.2d 844, 848 (1978). He lamented the possibility that the results of a medical test, upon which a workers' compensation award is based, might be "wrong because [the hospital] hired an inexperienced technician who performed his first test on a particular claimant and misread a crucial result[.]" 162 W.Va. at 237, 248 S.E.2d at 848.

Simply because a test is performed by a "qualified" technician or a "highly-trained" physician does not mean the result is necessarily accurate. "Each method of testing for . . . impairment involves a combination of human skill and medical technology. Associated with this combination is not only the possibility of accuracy, but also the possibility of inaccuracy due to technician error, faulty equipment, or any number of other potential problems." *Javins v. Workers' Compensation Comm'r*, 173 W.Va. 747, 757, 320 S.E.2d 119, 129 (1984).

In the instant case, the claimant, the employer and the Division grappled with whether the test results of the claimant's hearing by two competing physicians was accurate and reliable. One physician found a .73% impairment, the other a 10.65% impairment. There is nothing in the record to say either test result is unreliable; hence, under the rule of liberality, the impairment rating *most* favorable to the claimant should be adopted.

However, under *Bilbrey v. Workers' Compensation Comm'r*, 186 W.Va. 319, 412 S.E.2d 513 (1991), we concluded that the impairment rating *least* favorable to the claimant should be adopted by the Division. The reasoning behind *Bilbrey* was that scientific studies had shown that noise-induced, work-related hearing loss never progresses and never gets worse once a claimant is removed from the work environment (*i.e.*, retires). So, if a test of a claimant's hearing showed one level of hearing loss, and another showed a worse level of hearing loss, then the worse level must be attributable to something other than work-related noise. The Division would then give the claimant an award based on the better level of hearing, and least amount of hearing loss.

The punitive aspect of *Bilbrey* lay in the fact that if a claimant's hearing was bad, and the test result showing the worst level of hearing loss was truly correct, then the claimant never got properly compensated. The claimant could never re-open his claim for additional compensation, because the Division and employer could rightfully defend the claim by arguing that work-related, noise-induced hearing loss never progresses. Hence, any hearing loss that occurred after the Division gave the claimant his/her initial low award was, *prima facie*, the result of non-occupational causes. And if the Division later based its award of medical

benefits, such as hearing aids, on certain percentages of hearing loss, then an aging claimant living on a pension, who had wrongfully received a low percentage of hearing loss, would be forced to pay work-related medical expenses out of his or her pocket.

The majority's opinion tries to gracefully walk a line between the punitive aspects of *Bilbrey* – which are based in science and not the law – and the statutorily-imposed rule of liberality. Doctors employed by claimants, employers, and the Division are all subject to human error, philosophical predisposition, and even, occasionally, unimaginative cupidity. The doctors in this case seemed to agree that there are acceptable "margins of error" in hearing test results, and so within that margin of error the Division should apply the rule of liberality – in other words, to a limited extent we have overruled *Bilbrey*.

Still, the Division needs to enact simple yet comprehensive rules to guide claimants, employers, doctors, and their attorneys to bring some cohesiveness to hearing loss claims. Whether a claimant has hearing loss is a highly subjective issue, so to the extent possible, the Division should seek to objectify as many steps in the processing of a hearing loss claim as it possibly can. But whatever the final process, it should be simple enough that a claimant and his doctor, and even the claimant's employer, can quickly and fairly get through the process. They should be able to resolve a claim without the assistance of an attorney, who alone knows where to find and interpret the Division's rules. The workers' compensation fund was designed as a quick remedy for workers' and employers; it was not intended to be a system of lifetime employment for lawyers.

It is unfair to suggest that the rule of automatically awarding the claimant the lowest impairment rating contained in the record, as espoused in *Bilbrey*, has been a fair and proper rule under the Workers Compensation Act. Never mind the fact that the legal reasoning in *Bilbrey* runs contrary to virtually every other case discussing the evaluation of impairment under our workers' compensation laws. *Bilbrey*, no matter how far afield from the Workers' Compensation Act it may be, should not remain our law simply because several recent newspaper articles have suggested that the workers' compensation fund is in financial difficulty. The decisions of this Court are to be guided by the *United States* and *West Virginia Constitutions*, the laws enacted by the Congress and the Legislature, and centuries of common law crafted by jurists like ourselves, and not the daily pronouncements of the press.

I encourage the Division, in enacting rules for future hearing loss claims, to endeavor to eliminate human error, philosophical predisposition, and unimaginative cupidity from the processing of hearing loss claims. I otherwise respectfully concur with the majority opinion.