No 29645 - McKenzie v. Smith

FILED
July 17, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
July 17, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, C.J., dissenting:

"The right to dissent is the only thing that makes life tolerable for a judge of an appellate court."[1] As is evident from the numerous separate opinions I have authored this term, I find ever more frequently the need to exercise my right to dissent, and to urge my brethren to refrain from torturing the law of this state, and/or usurping the role of the legislature, to achieve their desired result *du jour*. And so, once again, I must disagree with the decision of the majority.

This case was brought as a simple request by Michael McKenzie for a writ of mandamus to compel the Commissioner of the Workers' Compensation Division (hereinafter "the Commissioner") to provide him with vocational rehabilitation services. Although the requested services were granted to Mr. McKenzie during the pendency of this appeal, the majority declined to dismiss the case as moot. Instead, the majority ruled that only a claimant, as opposed to the Commissioner, may select his or her vocational rehabilitation service providers. To reach this holding, the majority confuses physical and vocational rehabilitation,

[1]William O. Douglas, *America Challenged* 4 (1960).

misuses the extraordinary remedy of mandamus, and extends the rule of liberality beyond any bounds anticipated by the legislature or our predecessors on this Court. Consequently, for the reasons set out below, I dissent.[2]

A. Rehabilitation Services: Vocational versus Physical

There are two types of rehabilitation referred to in the workers' compensation statutes, vocational and physical. One of the most glaring problems with the majority opinion is its failure to distinguish between these two types of services. It is crucial that this distinction be made as these two types of rehabilitation are very different,[3] and are not necessarily subject to the same statutory provisions.[4] Pursuant to W. Va. Code § 23-4-9(b) (1999) (Supp. 2001), *physical* rehabilitation services refer to "the provision of crutches, artificial limbs, or other approved mechanical appliances, or medicines, medical, surgical, dental or hospital treatment[,]"[5] while *vocational* rehabilitation services include "vocational

---

[2]I note that I do not condone the type of conduct allegedly engaged in by the employer in this case. Had the Commissioner not ultimately granted Mr. McKenzie the rehabilitation services he sought, Mr. McKenzie could have pursued a remedy in this court via an appeal. *See, e.g., Skaggs v. Eastern Assoc. Coal Corp.*, ___ W. Va. ___, ___ S.E. 2d ___ (No. 30190) (Davis, C.J., concurring, with Maynard, J., joining).

[3]While, in some respects the two terms are commingled in the regulations, the regulations nevertheless are clear that a vocational rehabilitation service provider is not the equivalent of a health care provider. *See infra* text at pages 4 and 5.

[4]The claimant in this case was seeking vocational rehabilitation services, not physical rehabilitation services.

[5]*See also* 7A C.S.R. § 85-15-3.7 (1994) (defining physical rehabilitation (continued...)

or on-the-job training, counseling, assistance in obtaining appropriate temporary or permanent work site, work duties or work hours modification[.]"[6] Clearly, then, *physical* rehabilitation is associated with the medical aspects of a claimant's recovery from a compensable injury, and *vocational* rehabilitation pertains to providing a claimant with job training and/or necessary accommodations to enable him or her to return to the workforce. *See Bender v. Deflon Anderson Corp*., 298 A.2d 346, 348 (Del. Super. Ct. 1972) ("In the framework of workmen's compensation, rehabilitation is generally considered to be of two types: physical and vocational. The former is simply an extension of medical treatment and undoubtedly would fall within the purview of existing statutes dealing with the employer's obligation to provide medical services and the employee's duty to accept them. 2 Larson Workmen's Compensation Law, § 61.20, p. 88.262. The second aspect of rehabilitation, *i.e.* vocational, does not strictly speaking, involve the supplying of medical services but is, instead, a means for retraining an injured employee in an effort to direct his limited physical capability into other useful channels of productivity.").

In its rush to legislate, the majority has made these two terms synonymous.[7] This

---

[5](...continued)
services).

[6]*See also* 7A C.S.R. § 85-15-3.10 (1994) (defining vocational rehabilitation services).

[7]My dissent focuses solely upon the issue of *vocational* rehabilitation services, as that is the type of rehabilitation identified in Mr. McKenzie's appeal.

commingling of "apples and oranges" was purposefully done to obscure the complete absence of authority supporting the majority's holdings in this case.[8] While the majority correctly notes that W. Va. Code § 23-4-3(b) (1995) (Repl. Vol. 1998) grants a claimant the right "to select his or her initial *health care provider* for treatment of a compensable injury or disease" (emphasis added), it proceeds to then misapply this provision to conclude that it grants a claimant the exclusive right to select a vocational rehabilitation service provider. It is plainly evident that a vocational rehabilitation service provider, under its statutory definition as well as common nomenclature, is *not* a health care provider. Vocational rehabilitation services are limited to "vocational or on-the-job training, counseling, assistance in obtaining appropriate temporary or permanent work site, work duties or work hours modification[.]" W. Va. Code § 23-4-9(b). Nothing in this description refers to health care, thus there is absolutely no statutory support for granting a claimant the right to select a vocational counselor under the guise of selecting an initial health care provider under W. Va. Code § 23-4-3(b). In fact, the regulations expressly prohibit such an interpretation. *See* 7A C.S.R. § 85-15-3.11.2 (stating "the term [vocational rehabilitation services provider] does not include licensed physicians, licensed psychologists or hospitals where the services being provided to an injured employee fall under the provisions of W. Va. Code § 23-4-3, and are outside the scope of the pertinent rehabilitation plan.").

[8]*But see supra* note 3.

W. Va. Code § 23-4-3(b) is plain in permitting claimants to select their initial "health care provider." Consequently, it was unnecessary and improper for the majority to interpret the statute. It is black letter law that "'[w]hen a statute is clear and unambiguous and legislative intent is plain the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.'" *Hall v. Board of Educ. of County of Mingo*, 208 W. Va. 534, 539, 541 S.E.2d 624, 629 (2000) (quoting Syl. pt. 1, *Cummins v. State Workmen's Comp. Comm'r*, 152 W. Va. 781, 166 S.E.2d 562 (1969)). Moreover, "[i]t is also the 'duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.'" *Hall*, 208 W. Va. at 539, 541 S.E.2d at 629 (quoting *State v. Kerns*, 183 W. Va. 130, 135, 394 S.E.2d 532, 537 (1990)). In the instant proceeding, the majority has embraced an "absurd" reading of W. Va. Code § 23-4-3(b).

B. Writ of Mandamus

The majority accurately points out that W. Va. Code § 23-4-3(b) also directs that no employer is permitted to "enter into any contracts with any hospital, its physicians, officers, agents or employees to render medical, dental or hospital service or to give medical or surgical attention therein to any employee[.]" However, the majority is absolutely wrong in finding that this prohibition prevents the Commissioner from using a list of employer preferred vocational rehabilitation service providers. As noted above, nothing contained in W. Va. Code § 23-4-3(b) pertains to *vocational* rehabilitation services. Therefore, this statute

does not provide a proper basis for ruling that employers may not submit a list of preferred vocational rehabilitation service providers to the Commissioner.

Neither the majority opinion nor my own independent research has uncovered any statute in the workers' compensation laws expressly prohibiting the Commissioner from using a list of employer preferred vocational rehabilitation providers. However, W. Va. Code § 23-4-9(e) provides that "[t]he commissioner shall promulgate rules for the purpose of developing a comprehensive rehabilitation program which will assist injured workers to return to suitable gainful employment[.]" Under the authority of this provision, the Commissioner is granted discretion to implement a method for providing vocational rehabilitation services to claimants. The Commissioner has exercised this discretion by developing the aforementioned list.

Because the actions of the Commissioner were discretionary, it was improper for the majority to grant the writ of mandamus to impose its own judgment over that of the Commissioner. This Court has "characterized the purpose of the writ [of mandamus] as the enforcement of an established right and the enforcement of a corresponding imperative duty created or imposed by law." Syl. pt. 1, *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 398, 540 S.E.2d 917, 922 (1999) (citing *State ex rel. Bronaugh v. City of Parkersburg*, 148 W. Va. 568, 136 S.E.2d 783 (1964)). It has been explained further that "[m]andamus is a proper remedy to require the performance of a *nondiscretionary* duty by various governmental

agencies or bodies." Syl. pt. 1, *State ex rel. Allstate Ins. Co. v. Union Pub. Serv. Dist.*, 151 W. Va. 207, 151 S.E.2d 102 (1966) (emphasis added). While it is true that "[m]andamus lies to control the action of . . . administrative officer[s] in the exercise of [their] discretion when such action is arbitrary or capricious[,]" Syllabus, *Beverly Grill, Inc. v. Crow*, 133 W. Va. 214, 57 S.E.2d 244 (1949), "'*it is never employed to prescribe in what manner they shall act, or to correct errors they have made*.'" *State ex rel. State v. Gustke*, 205 W. Va. 72, 76 n.2, 516 S.E.2d 283, 287 n.2 (1999) (quoting Syl. pt. 8, *Nobles v. Duncil*, 202 W. Va. 523, 505 S.E.2d 442 (1998) (additional citation omitted)). *Accord* Syl. pt. 4, *Paxton v. State Dep't of Tax and Revenue*, 192 W. Va. 213, 451 S.E.2d 779 (1994); Syl. pt. 3, *Anderson v. Richardson*, 191 W. Va. 488, 446 S.E.2d 710 (1994); Syl. pt. 6, *Lyons v. Richardson*, 189 W. Va. 157, 429 S.E.2d 44 (1993); *Francis O. Day Co., Inc. v. West Virginia Reclamation Bd. of Review*, 188 W. Va. 418, 422, 424 S.E.2d 763, 767 (1992); Syl. pt. 2, *State ex rel. Lambert v. Cortellessi*, 182 W. Va. 142, 386 S.E.2d 640 (1989); Syl. pt. 3, *State ex rel. Canterbury v. County Court of Wayne County*, 151 W. Va. 1013, 158 S.E.2d 151 (1967); *Meador v. County Court of McDowell County*, 141 W. Va. 96, 112, 87 S.E.2d 725, 736 (1955); Syl. pt. 1, *State ex rel. Buxton v. O'Brien*, 97 W. Va. 343, 125 S.E. 154 (1924). The majority's holding in this case merely corrected a perceived error committed by the Commissioner in exercising his discretionary authority. In the absence of a finding that the Commissioner's actions were arbitrary or capricious, it was simply wrong to use the extraordinary remedy of mandamus in this manner.

The ultimate result of the majority decision in this case is to overrule a long line of precedent prohibiting the use of a writ of mandamus to dictate the manner in which a government agency should exercise its discretionary authority. The majority has mandated the precise manner in which the Commissioner may exercise his discretion to develop a method for selecting vocational rehabilitation service providers, by permitting only claimants to make the selection. The majority's decision has made the writ of mandamus a tool to be used by the Court to control any and every government action it desires. This new extension of the writ of mandamus has no constitutional basis, and is a real and dangerous threat to the separation of powers doctrine embodied in this state's constitution. *See State ex rel. League of Women Voters of West Virginia v. Tomblin*, 209 W. Va. 565, 579, 550 S.E.2d 355, 369 (2001) (Davis, J., dissenting) ("Integral to the separation of powers is the notion that each of the branches of government has its own constituent components and its own defined functions.").

C. Rule of Liberality

Finally, and most troubling, is the majority's reliance on the rule of liberality as justification to rewrite statutes in this case. In this and other workers' compensation cases recently decided by this Court,[9] a majority of its members have demonstrated a disturbing trend of touting the liberality rule to rationalize overstepping this Court's authority in order to

[9]*See, e.g., Repass v. Workers' Comp. Div.*, ___ W. Va. ___, ___ S.E.2d ___ (Nos. 27730 and 28392 June 28, 2002), and *Skaggs v. Eastern Assoc. Coal Corp.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 30190 June 28, 2002).

achieve desired goals. *See, e.g., Martin v. Workers' Comp. Div.*, 210 W. Va. 270, 285, 557 S.E.2d 324, 339 (2001) (Maynard, J., dissenting) (observing that this Court "routinely cites the liberality rule and uses it to justify its decisions in workers' compensation appeals."). Contrary to this unabashed exploitation, the rule of liberality has historically been used in workers' compensation cases in a manner that did not sacrifice basic legal principles and trample upon the authority of the legislative and executive branches of government.

In my dissenting opinion in *Repass v. Workers' Comp. Div.*, ___ W. Va. ___, ___ S.E.2d ___ (Nos. 27730 and 28392 June 28, 2002) (Maynard, J., joining), I explain in detail that the rule of liberality, which must be mollified by reasonableness, should never be used as an excuse to interpret statutory language that is plain, or to engage in improper judicial legislating. *See also Ford v. Mitcham*, 53 Ala. App. 102, ___, 298 So. 2d 34, 36 (1974) ("liberality of construction should not proceed to such a point as to amount to judicial legislation."); *Deese v. Southeastern Lawn & Tree Expert Co.*, 306 N.C. 275, ___, 293 S.E.2d 140, 143 (1982) ("liberality should not . . . extend beyond the clearly expressed language of th[e] [statutes], and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of judicial legislation. . . . [C]onsequently, the judiciary should avoid ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced." (citations and internal quotation marks omitted)); *In re. Corman* 909 P.2d 966, 971 (Wyo. 1996) ("[C]ourts are not free under the guise of liberal construction to extend worker's compensation benefits . . . that do not *reasonably* fall within

the statute." (citation omitted) (emphasis added)).

In the case *sub judice*, the majority has employed the rule of liberality to judicially create legislative requirements that cannot reasonably be gleaned from existing statutes. Such action is simply wrong. As one court put it, the rule of liberality "does not imply that liberality is boundless or that common sense is disregarded." *Christian Civic Action Comm. v. McCuen*, 318 Ark. 241, ___, 884 S.W.2d 605, 608 (1994). The type of brazen and illogical crusading engaged in by the majority in this case was appropriately denounced in the dissenting opinion of *Quinn v. State*, 15 Cal. 3d 162, ___, 124 Cal. Rptr. 1, 13, 539 P.2d 761, 773 (1975) (Clark, J., dissenting):

> [T]he statutory rule of liberal construction, relied on by the majority, does not invest this court with power to administer workers' compensation as we see fit. . . . "[H]ow far . . . 'liberality' may extend would seem to depend upon two considerations: (1) the latitude permitted by the wording of the statute which is to be construed; and (2) the latitude permitted, within such limitations, by the views of the reviewing tribunal. The first is a limitation of an objective character; the second is a subjective or personal limitation. When the latter ignores the former, [a] question may well arise as to where liberal interpretation ends and nullification begins." . . . We must eschew the temptation to become crusaders.

(Internal citations omitted). Without some modicum of restraint by the majority, our worker's compensation system may soon succumb to irreparable damage.

D. The End of the Road for the West Virginia Workers' Compensation System

The decision of the majority in this case represents a form of unbridled judicial activism that is an insult to the principles of statutory construction developed by this Court to maintain the integrity of the independent branches of state government. Indeed, this case represents yet another example of the determination of the majority to use the rule of liberality to undermine any statute or executive regulation designed to promote the fiscal health of our workers' compensation system. In this regard, I agree with the dissent in *Stephen L.H. v. Sherry L.H.*, espousing that "[j]udicial activism is one thing; stupid judicial activism quite another." 195 W. Va. 384, 398 n.2, 465 S.E.2d 841, 855 n.2 (1995) (Neely, C.J., dissenting).

I am at a loss as to what it will take for the majority to realize that there is a future generation of workers who will need the services of a healthy and viable workers' compensation system. The decision in this case is simply another step by the majority in a journey leading ultimately to a workers' compensation system so afflicted by unreasonable laws that it will become utterly incapable of providing legitimate claimants with the benefits and services they so desperately need.

In view of the foregoing, I dissent. I am authorized to state that Justice Maynard joins me in this dissenting opinion.