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The Expanding Role of the West Virginia Supreme Court of Appeals in the Review of Workmen's Compensation Appeals

David M. Flannery
*Love, Wise, Robinson & Woodroe*

Joseph S. Beeson
*Love, Wise, Robinson & Woodroe*

M. Ann Bradley
*Love, Wise, Robinson & Woodroe*

Richard P. Goddard
*Washington and Lee University*

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The November elections of 1976 brought about a major change in the composition of the West Virginia Supreme Court of Appeals. Three new justices, a majority of the court, were elected. The consequences of the election have been widely felt throughout the State. In no area has its impact been greater, however, than in the area of workmen's compensation law.

The court has shown a great willingness to hear workmen's compensation appeals. In reviewing such appeals, the court has...
chosen to play an active role in the review of evidence, something generally avoided by prior courts. There has been little reluctance to substitute the majority’s assessment of the evidence for the factual findings of the Workmen’s Compensation Appeal Board. In substantive law the court has likewise had great impact, and in certain areas has taken action which would normally be considered within the purview of the legislature. Most significantly, the statutory immunity to suit granted to employers by the West Virginia Workmen’s Compensation Act, except in cases of treatment of appeals in workmen’s compensation matters since January 1, 1977, resulted in the compilation of the following statistics. From January 1, 1977, to September 15, 1978, employers and employees requested review from the supreme court of appeals of eighty-four decisions of the Workmen’s Compensation Appeal Board. Review was requested by employers in only fourteen of those eighty-four cases, or approximately seventeen percent of the total reviews requested. Employees requested review in seventy cases, or eighty-three percent of the total reviews requested. The court granted review in sixty-one cases or seventy-three percent of all appeals taken. During the twenty months since January, 1977, the court has granted review in only one appeal by an employer. In contrast, the court has consented to hear sixty appeals by employees, approximately eighty-six percent of all employee appeals and ninety-eight percent of the total appeals granted. The authors wish to express their appreciation to Beverly Reid, Charleston, West Virginia, for her invaluable assistance in compiling the statistics utilized in this footnote and throughout this article and, otherwise, for her considerable involvement in the preparation of this article.


In the workmen’s compensation decisions rendered from January 1, 1977, to September 15, 1978, the court has held in favor of the employee on forty-nine occasions. The court limited employer relief to only one case during this twenty-one month period.
intentional injury, has been altered to an extent which will only be finally determined by later cases. Other decisions have: liberalized the continuous exposure requirements of the occupational pneumoconiosis provisions of the Act; removed the requirement of demonstrating aggravation of an existing occupational pneumoconiosis condition with a particular employer in order to be entitled to benefits; extended the protection of a legislatively lengthened statute of limitations to claimants whose occupational pneumoconiosis claims were not yet barred when the new limitation period became effective; permitted concurrent recovery of benefits in separate claims even though the total amount of benefits paid exceeded statutory limits; liberalized requirements for reopening claims; and provided protection for innocent victims of horseplay.

This article will assess the new court's role in reviewing both substantive and procedural aspects of workmen's compensation law. The discussion is divided into two broad areas: substantive changes in West Virginia workmen's compensation law; and scope of the court's review.

I. SUBSTANTIVE CHANGES IN WEST VIRGINIA WORKMEN'S COMPENSATION LAW

A. Employer Immunity

The court's most significant decision focusing on workmen's compensation is undoubtedly Mandolidis v. Elkins Industries, Inc. In Mandolidis, the court construed several sections of the Workmen's Compensation Act which expressly prohibit recovery

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12 246 S.E.2d 907 (W. Va. 1978). The proper spelling of the plaintiff's name is Manolidis. See Petition, Note of Argument and Brief on Behalf of Plaintiffs in Error, James Manolidis and June Manolidis. The spelling adopted by the court, however, will be retained throughout this article.
13 In 1913, the West Virginia Legislature enacted the Workmen's Compensation Fund Act of 1913, ch. 10, 1913 W. Va. Acts 64, the precursor of the State's present Workmen's Compensation Act. The legislature had recognized the inequities of the State's common law system of compensation for work-related injuries. Due largely to the availability to employers of common law defenses to claims by
of damages by an employee against his employer for a work-related injury unless the injury results from the employer's "deliberate intention."14 Article 2, section 6 of the Act grants employers who are subscribers to the workmen's compensation fund or self-insurers of workmen's compensation benefits immunity from damages at common law or by statute for injury to or death of an employee.16 This immunity is limited, however, to employers who do not act with a deliberate intention to injure or cause the death of an employee. Should injury to or death of an employee result from the deliberate intention of the employer, Article 4, section 2 grants the employee or his survivors a cause of action against the employer for any excess of damages over the amount received or receivable under the Act.18

employees, few workers injured in industrial accidents recovered compensation. See generally 1 A. Larson, The Law of Workmen's Compensation §§4.00-.50 (1978). The legislature determined that public policy required that workers injured on the job receive greater protection than that afforded by common law. Because of its concern for the injured worker and his family, the legislature supplanted the common law with a no-fault Workmen's Compensation Fund. Under this system, workers injured in industrial accidents would be compensated regardless of fault, while, as a trade-off, participating employers would enjoy a statutory immunity from damage claims by the same workers. Through the provisions of the Act, the legislature sought to eliminate litigation and remove obstacles and delays which had hindered the recovery of compensation by employees for industrial injuries. Maynard v. Island Creek Coal Co., 115 W. Va. 249, 252-53, 175 S.E. 70, 71-72 (1934); see North v. United States Steel Corp., 495 F.2d 810, 813 (7th Cir. 1974). For a brief description of a typical workmen's compensation act, see 1 A. Larson, The Law of Workmen's Compensation §§1.00-.20 (1978). Since 1913 the legislature has periodically revised the original act.

16 Article 2, section 6 provides, in relevant part:

Any employer subject to this chapter who shall subscribe and pay into the workmen's compensation fund the premiums provided by this chapter or who shall elect to make direct payments of compensation as herein provided, shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after so subscribing or electing, and during any period in which such employer shall not be in default in the payment of such premiums or direct payments and shall have complied fully with all other provisions of this chapter.


18 Article 4, section 2 of the Act provides, in part:

If injury or death result to any employee from the deliberate inten-
As the basis for its review, the court consolidated three cases for argument and decision: Mandolidis v. Elkins Industries, Inc., Snodgrass v. United States Steel Corp., and Dishmon v. Eastern Associated Coal Corp. The plaintiff in Mandolidis had worked as a machine operator and lost two fingers and part of his right hand while operating a ten-inch table saw not equipped with a safety guard. In his complaint, Mandolidis alleged: that his employer refused to install a proper safety guard on the saw in knowing violation of state and federal safety laws; that the employer knew the consequences of ordering the use of the saw and similar machinery because other employees had been injured severely due to the lack of safety guards; and that the employer ordered workers to use the saw and other machinery without guards or be fired. Mandolidis also alleged that shortly before his own accident, federal safety inspectors had cited the employer for violations of the Occupational Safety and Health Act of 1970 because the saw was not equipped with a guard and had directed that no one use the saw until the employer complied with the safety statutes. Mandolidis claimed that shortly thereafter the employer returned the machine to production and ordered workers to operate the saw without the prescribed guard. Plaintiff's injury resulted.

In Snodgrass, four workmen were injured and one was killed when a metal cable dislodged a wooden platform on which they were working and caused them to fall nearly twenty-five feet into an excavation. Plaintiffs alleged that the injuries and death were caused by defendant's failure to provide a safe place to work, failure to warn plaintiffs of the danger, and various violations of state and federal safety laws.
Plaintiff's decedent in *Dishmon* had reported to defendant's mine for work. Shortly thereafter, a large quantity of slate fell from the roof of the work area and crushed the employee to death. Dishmon's widow filed suit and alleged that defendant deliberately, wilfully, and wantonly allowed employees, including the decedent, to work in conditions that violated federal and state safety laws and regulations governing roof supports and the use of explosives in mines. The plaintiffs in each of the three cases alleged that the acts of each defendant produced a wilful and intentional injury, resulting in the loss of statutory immunity.

The majority opinion in the *Mandolidis* decision is significant both procedurally and substantively. All three defendants had moved to dismiss the suits, claiming statutory immunity. Because the defendants in *Mandolidis* and *Snodgrass* submitted affidavits in support of their positions, the court treated their motions as motions for summary judgment. Thus, the questions presented to the respective trial courts in these two cases were whether plaintiffs presented a genuine issue of material fact and whether defendants were entitled to judgment as a matter of law. The court noted that the facts alleged by the plaintiffs in both *Mandolidis* and *Snodgrass* differed sharply from the defendants' assertions and presented genuine issues of fact which could directly affect the

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22 Id. at 917. The defendants in *Mandolidis*, *Snodgrass*, and *Dishmon* each moved in the circuit court, pursuant to W. VA. R. Civ. P. 12(b)(6), to dismiss the action against them on the ground that they were entitled to immunity from suit under the Act. See W. VA. Code §§ 23-2-6, -9 (1978 Replacement Vol.). The defendants in *Mandolidis* and *Snodgrass* filed affidavits with and in support of their motions to dismiss. When a party supports a motion to dismiss with matters outside the pleadings, a court will treat the motion as a motion for summary judgment pursuant to W. VA. R. Civ. P. 56.

outcome of the action. The court, therefore, held that the trial courts erred in dismissing the claims. The court also reversed the lower court's dismissal in *Dishmon* because it held that the allegations in the complaint, when taken as true, stated a claim for relief.

The *Mandolidis* decision, however, goes far beyond the mere procedural questions raised in the three suits. First, the court held that an employer acts with "deliberate intent to produce an injury or death" and loses his immunity from common law actions by employees whenever his conduct constitutes an intentional tort or wilful, wanton, and reckless misconduct. The court then defined such conduct as action "undertaken with a knowledge and an appreciation of the high degree of risk of physical harm to another created thereby." Moreover, the court noted that evidence of prior injuries or deaths resulting from working conditions or practices as well as the employer's knowledge of the existence and contents of federal and state safety laws and regulations is admissible to establish an employer's knowledge of the risk of harm created by a course of conduct. Although the court affirmed a prior holding that "gross negligence" is not to be equated with "deliberate intent," the court implied that the jury, as the trier of fact, should determine whether an employer's conduct exposes him to tort liability.

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28 Id. at 918-19.
29 Id. at 921.
30 Id. at 921. The court's redefinition of the "deliberate intent" provisions of the Act is virtually identical to the test used to determine the appropriateness of punitive damages in a civil action. The West Virginia Supreme Court of Appeals has held that punitive damages are appropriate where the defendant has acted with bad motive, gross negligence, wantonly, recklessly, or wilfully; that is, in such manner as to evidence a willful disregard of the rights of others. *Yates v. Crozer Coal & Coke Co.*, 76 W. Va. 50, 84 S.E. 626 (1915); *Talbott v. West Virginia C. & P. Ry.*, 42 W. Va. 560, 26 S.E. 311 (1896); *Mayer v. Frobey*, 40 W. Va. 246, 22 S.E. 58 (1895). See *Spencer v. Steinbrecher*, 102 W. Va. 490, 164 S.E.2d 710 (1968). In any case, then, where the plaintiff is able to get to the jury on the question of "deliberate intent," he should also be entitled to an instruction on punitive damages.

32 Id. at 914 n.10.
An analysis of the court's decision in Mandolidis raises the question of whether the construction given the words "deliberate intention" reflects the legislative intent underlying that limitation on employer immunity under the Workmen's Compensation Act. The Mandolidis court observed that in early applications of the deliberate intention language, the Supreme Court of Appeals failed to articulate specifically the type of employer conduct sufficient to trigger the denial of immunity. The court first addressed the question in 1933 while reviewing the sufficiency of a pleading in Collins v. Dravo Contracting Co. The Mandolidis court properly noted that the Collins court, while holding the facts averred to be sufficient to require the employer to defend on the merits, recognized that an employer could deliberately intend to cause injury or death by an act of omission. Such a holding, however, does not suggest that an act of omission will be sufficient to negate the employer's statutory immunity unless done with a specific intent to injure or kill.

One year later, in its second attempt to define the standard, the court, in Maynard v. Island Creek Coal Co., stated that an

31 Id. at 911-12.
32 114 W. Va. 229, 171 S.E. 757 (1933). The Collins court reversed the judgment of the trial court and remanded the case for trial on the theory of deliberate intent to injure or kill. Id. at 236, 171 S.E. at 759.
33 Id. at 235, 171 S.E. at 759.

We cannot see why the master cannot omit to perform a certain duty imposed by law upon him with the deliberate intent by so doing to inflict injury or death upon his employee. . . . If the defendant . . . knew full well that such conditions existed; then . . . we cannot see why the very conditions alleged . . . might not have been permitted to continue with the deliberate intent on the part of the employer, and with a design, that their continuance should cause injury or death or both to its employees.

Id. (emphasis added). Although the court in Collins recognized that an employer may deliberately intend to injure an employee through an omission, that court also noted that the omission must be part of a design to injure or kill before an employee may avail himself of the deliberate intention exception to the employer immunity provision under W. Va. Code § 23-4-2 (1978 Replacement Vol.).
35 115 W. Va. 249, 175 S.E. 70 (1934). In dismissing the claim founded on the deliberate intention theory, the Maynard court noted:

Gross negligence is not tantamount to "deliberate intention" to inflict injury. It may be that the carelessness, indifference and negligence of an employer may be so wanton as to warrant a judicial determination that his ulterior intent was to inflict injury. But in the very nature of
employer loses his statutory immunity from suit if the reasonably anticipated, natural and probable consequence of the employer's conduct would be death or serious injury to the employee.\(^4\) In 1936, however, the court, in *Allen v. Raleigh-Wyoming Mining Co.*,\(^4\) announced that an employee seeking damages from his employer for a work-related injury must show a specific intent on the part of the employer to injure him in order to support a recovery.\(^4\) *Allen* is not inconsistent with either *Collins* or *Maynard* and, in fact, would appear merely to represent a sharpening and focusing of the court's earlier opinions. Although the *Mandolidis* court held *Allen* to be inconsistent with *Maynard* and overruled the former, the following language from *Maynard* indicates that *Allen* and *Maynard* are not irreconcilable:

The degree of an employer's negligence in a given instance is not determinative of the status of the employee's rights. The statute does not provide, and cannot be interpreted to mean, that if the employer is mildly negligent he shall be protected by the compensation act, but that if he is grossly negligent he shall not be protected. Whether through further legislative refinement a differentiation can or should be made between the degrees of negligence of employers is a matter not relevant for judicial discussion. Our point is that under the existing statute, negligence must be considered in its entirety and not gradationally. The alleging of gross negligence does not change the status between employee and employer, under the workmen's compensation statute.

Gross negligence is not tantamount to "deliberate intention" to inflict injury.\(^4\)

\(^{4}\) Id. at 253, 175 S.E. at 72.

\(^{4}\) Id.

\(^{4}\) 117 W. Va. 631, 186 S.E. 612 (1936). The plaintiff in *Allen* was injured while riding at the front of a trip of empty coal cars in defendant's mine when he was struck by a wooden trapdoor hung across the tracks. *Id.* at 632-33, 186 S.E. at 612-13.

\(^{4}\) The *Allen* court set aside a judgment for the plaintiff and held that an employee may not recover damages for personal injury from an employer protected by workmen's compensation law absent a showing of the employer's specific intent to injure him. *Id.* at 636-37, 186 S.E. at 614.

The Mandolidis court expressly overruled Allen's specific intent requirement. The court concluded from the language used in Collins and Maynard that both earlier decisions had rejected, as a prerequisite to a common law recovery, the requirement that the employee prove his employer's specific intent to injure him. In the face of the forty-two year life span of the specific intent construction and the legislative history behind the statute, the Mandolidis court redefined the limit on employer statutory immunity from suit. The court declared that the Allen construction worked an injustice on employees because it deprived them of claims against employers who carried on their enterprises with a knowing and calculated disregard for human safety. The court, therefore, announced that if injury results from an intentional tort or willful, wanton, and reckless misconduct, a jury should be permitted to find that the employer deliberately intended the injury within the meaning of the Act.

In general, a court's purpose in construing a statute is to ascertain and give effect to the legislative intent underlying the statute. Furthermore, when a legislature adopts a statute from another jurisdiction, the construction given the statute by that jurisdiction usually will govern. As part of its first workmen's compensation act, Washington originated a provision granting employers limited immunity from common law actions by employees for work-related injuries. West Virginia, Kentucky, Maryland, and

\[\footnotesize{\text{\cite{Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907, 909, 913 (W. Va. 1978).}}\]

\[\footnotesize{\text{\cite{See notes 38-39 supra.}}\]

\[\footnotesize{\text{\cite{Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907 at 912-13 (W. Va. 1978). The court noted that the Collins court had declined to interpret Article 4, section 2 of the Act as requiring a showing that the employer acted with a specific intent to injure the employee-plaintiff although defendant's counsel had argued for such a construction. \cite{See Brief for the Defendant in Error at 17-18, Collins v. Dravo Contracting Co., 114 W. Va. 229, 171 S.E. 757 (1933).}}\]

\[\footnotesize{\text{\cite{See Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907 at 913-14 (W. Va. 1978); see text accompanying notes 30-34 supra.}}\]

\[\footnotesize{\text{\cite{Id. at 913.}}\]

\[\footnotesize{\text{\cite{Id. at 913-14.}}\]


Oregon later enacted similar compensation statutes and adopted almost verbatim the limited employer immunity provision. Since those enactments, all jurisdictions which have addressed the question have construed the immunity provision as requiring a specific intent to injure before the employer is exposed to common law liability. As noted above, West Virginia adopted such a construction in Allen v. Raleigh-Wyoming Mining Co. and applied it consistently thereafter. The West Virginia Legislature re-enacted the limited immunity provision without change subsequent to the court's construction in Allen and indicated through its acquiescence that the court had properly construed the provision. More compelling evidence of the legislature's adoption of the Allen construction of "deliberate intention" is the refusal by the legislature to pass any of the eleven bills proposed since 1969 which would have altered the deliberate intent requirement. State representatives introduced bills to amend the deliberate intention standard to require only a showing of wilful, wanton, and reckless misconduct, or gross negligence, and to create a rebuttable presump-

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26 Article 4, section 2, of the Act was amended and reenacted by the legislature without altering the "deliberate intention" provision in Act of Mar. 7, 1945, ch. 131, art. 4, § 2, 1945 W. Va. Acts 476, 495. The Supreme Court of Appeals has held that if the legislature reenacts a statute without change subsequent to construction of the statute, the court will deem the legislature to have adopted that construction. State v. Muntzing, 146 W. Va. 349, 358, 120 S.E.2d 260, 265 (1961); Parsons v. Roane County Court, 92 W. Va. 490, 496-97, 115 S.E. 473, 476 (1922); see 2A A. SUTHERLAND, STATUTORY CONSTRUCTION § 49.09 (4th ed. C. Sands 1973).


28 Several bills introduced into the Senate and House would have exposed employers to common law liability upon a showing of wilful, wanton, or reckless conduct or gross negligence by the employer or upon a violation by the employer of a statute or duly promulgated rule or regulation. Enr. S.B. 7, Reg. Sess. (1970) (by Mr. Kinsolving); Enr. H.B. 545, Reg. Sess. (1970) (by Mr. Zakaib); and Enr. S.B. 30, Reg. Sess. (1969) (by Mr. Kinsolving).

29 A bill introduced into the House on March 9, 1977, would have permitted
tion of deliberate intention where employer conduct violates a safety standard, among other proposed changes. The legislature refused to adopt any of the bills, thereby reaffirming approval of the Allen construction. Yet, the court, in one sweeping opinion, brought about a change in the law that numerous legislators have tried, without success, to effect for nearly ten years.

As noted previously, the Mandolidis court relied heavily upon Collins v. Dravo Contracting Co. for the proposition that prior courts had rejected the specific intent requirement. The specific intent requirement, however, was not at issue in Collins. In that decision the court held only that deliberate intention may be demonstrated by acts of omission. The focus of the Collins court was upon the employer's accompanying intent, not upon the omission. The employer in Collins ordered plaintiff's decedent to work under an earth bank which had caved in on several occasions. The employer's foreman allegedly knew that the bank was about to cave in again when he ordered the decedent to begin working beneath it. Shortly after the decedent moved beneath the over-
hanging bank, it collapsed and entombed him. Before remanding the case for trial on the merits, the court observed that if an employee can establish that his employer knowingly permitted conditions to exist which "would naturally result in injury or death . . . [and that the employer permitted those conditions to continue] with a design . . . that their continuance should cause injury or death or both to its employees" then the employee will have brought his claim within the deliberate intention exception to the employer immunity provision.

The court faced a different factual situation in *Maynard v. Island Creek Coal Co.* Plaintiff's decedent in *Maynard* stumbled on a bolt, fell through a defective covering onto a conveyor below, and was killed. The court held that the plaintiff's claim did not meet the prerequisites of the deliberate intention exception because the result of the decedent's stumbling "was characterized by fortuitousness rather than by anticipated sequence." Although the defective conveyor covering exposed workers to some degree of danger, the natural and probable consequence of that continuing defect was not serious injury or death to an employee. In drawing the distinction, the *Maynard* court pointed out that the employer in *Collins* knew when he directed his employee to work under the earth bank that the employee would be killed or seriously injured. The employer in *Maynard*, however, could not be charged with the same knowledge, despite the existence of the defective covering. In other words, the employer did not act with a deliberate intention to injure or kill the employee. Because the employer had not refrained from repairing the conveyor covering with a design to injure the decedent, he was entitled to statutory immunity.

The court in *Mandolidis* stated, nonetheless, that if an employee shows that his injury resulted from his employer's knowing failure to observe safety laws and regulations, then the employee will have produced evidence of employer conduct pursued with a knowledge and appreciation of the attendant risk of harm. The court defined such conduct as wilful, wanton, and reckless and

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44 *Id.* at 231, 171 S.E. at 757.
45 *Id.* at 234-35, 171 S.E. at 759 (emphasis added).
46 *Id.*
47 115 W. Va. 249, 175 S.E. 70 (1934).
48 *See* note 39 *supra.*
49 115 W. Va. at 253, 175 S.E. at 72 (emphasis added).
50 *Id.*; *see* note 76 *infra.*
51 Mandolidis v. Elkins Indus., Inc., 246 S.E.2d at 914 n.10 (W. Va. 1978).
sufficient to eliminate the employer's statutory immunity. This position, which espouses a constructive intent to injure, fails to distinguish between a negligent and an intentional violation of a safety statute; in other words, it does not distinguish an instance of negligence from a calculated course of conduct purposely pursued by the employer despite a clear risk of serious injury to employees. The Mandolidis court sought to eliminate the requirement that an employee seeking damages from his employer establish that the employer acted with a specific intent to injure the employee—that the employer determined to injure or kill the employee and acted either by commission or omission to accomplish that purpose. The court apparently intended to extend common law liability beyond employers who commit intentional torts to those who carry on their businesses with a reckless disregard for the safety of their workers.\(^7\)

The broad language employed by the majority, however, seems to sweep beyond this specific, policy goal. By announcing that an employer violation of a safety statute is competent evidence to establish the employer's knowledge of the risk of harm created thereby, and that conduct pursued with such knowledge may be deemed wilful, wanton, and reckless, the Mandolidis court came close to imposing strict liability on employers for injuries resulting from such violations.

\(^{11}\) Id. at 914.

\(^{7}\) Id. at 921 (Neely, J., dissenting).


\(^{11}\) Id. at 914.
Justice Neely's dissent may have helped to clarify the perimeters of the court's holding. He stated that trial courts should follow the distinction recognized in Collins and Maynard between negligent acts which cause injury and deliberate acts either designed to injure or performed with reckless disregard for employee safety.\textsuperscript{79} Justice Neely identified the issue of statutory immunity as a question of law in the first instance and directed trial courts to dismiss a plaintiff's case at the close of his evidence absent a clear showing of deliberate intention to injure or kill or a wilful, wanton, and reckless disregard for human life.\textsuperscript{80}

Justice Miller, in a concurring opinion written in response to Justice Neely's dissent, scolds Justice Neely for "his theoretical fears of increased nuisance suits."\textsuperscript{81} Justice Miller is careful to point out, however, that all the Mandolidis court has done is to hold "that these two cases [Dishmon and Snodgrass] are entitled to further development through discovery before the issue of deliberate intention can be determined under the guidelines of our opinion."\textsuperscript{82} If Justice Miller's concurring opinion reflects the view of the majority, it does much to clarify and soften the impact of Mandolidis. Justice Miller clearly indicates that the burden of proving deliberate intent remains a difficult obstacle to overcome and that summary judgment or a directed verdict are still available to the employer after the case has been properly developed.

Only by relegating the question of requisite intent to the trial judge may courts preserve the distinction between negligence and deliberate intention and safeguard, in any meaningful sense, the legislative intent underlying the statutory grant of employer immunity from suit.\textsuperscript{83} It may be that the only significance of

\textsuperscript{79} Id. at 922-23 (Neely, J., dissenting).

\textsuperscript{80} Id. at 923.

\textsuperscript{81} Id. at 926 (Miller, J. concurring).

\textsuperscript{82} Id. at 927 (Miller, J. concurring).

\textsuperscript{83} Because the legislature never intended to hold employers strictly liable to employees for violations of safety statutes which result in injury, a trial court should dismiss claims by employees which demonstrate only a violation. A comparison of the factual situations in Mandolidis and Snodgrass indicates the need for trial courts to distinguish between employer negligence which causes injury and a course of conduct pursued by employers with reckless disregard for the safety and lives of their workers. The plaintiffs in Mandolidis alleged that the employer knew of the serious danger imposed on the workers through the employer's insistence that those workers operate saws and similar machinery without prescribed safety equipment. The plaintiffs further alleged that despite several serious injuries caused by the dangerous equipment and contrary to direct orders by federal safety inspectors, the employer ordered his employees to work with the machinery. See text accompany-
Mandolidis is the court's determination that the cases were not sufficiently developed to permit a summary judgment or a dismissal. If so, it is difficult to quarrel with the decision. The language of the majority opinion suggests, however, that the question of employer immunity will often be submitted to the jury under the guidelines established by the court, thus effectively amending the immunity statute and raising the spectre of massive employer liability, despite the absence of deliberate intention to injure or kill. Such a construction is not apparent from the Act itself, from the legislative history, or from the consistent application of the Act by the court in every decision prior to Mandolidis. As suggested by Justice Neely:

This is one area of the law in which the threshold issue concerning statutory immunity is in no regard a "jury question." Minute supervision by the trial judge is mandated in all cases because the exception to the blanket workmen's compensation immunity which would permit a plaintiff to submit his case to a jury is so narrow, and the construction of what does or does not constitute a case within the exception is so technical, that trial judges should ruthlessly decide the issue as a matter of law in the first instance.44

B. Occupational Pneumoconiosis

Under the Workmen's Compensation Act, occupational pneumoconiosis is treated and compensated in the same fashion as a compensable injury.55 Unlike claims for work-related injuries, however, claims for occupational pneumoconiosis are developed through a bifurcated proceeding in which issues relating to dust exposure in the workplace environment are considered separately

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from medical issues. Similarly, the cases considered by the court can be classified as either exposure or medical.

1. Exposure Considerations

Presently, the threshold exposure issue in a claim filed for occupational pneumoconiosis is whether:

the employee has been exposed to the hazards of occupational pneumoconiosis in the State of West Virginia over a continuous period of not less than two years during the ten years immediately preceding the date of his last exposure to such hazards, or for any five of the fifteen years immediately preceding the date of such last exposure.

While occupational pneumoconiosis is defined by statute to be “a disease of the lungs caused by the inhalation of minute particles of dust over a period of time due to causes and conditions arising out of and in the course of the employment,” the statute provides no guidance as to what constitutes the “hazards of occupational pneumoconiosis” or “a continuous period of not less than two years.” Thus, these terms must be defined on the basis of case law or go undefined.

In the case of Meadows v. Workmen’s Compensation Commissioner, the Supreme Court of Appeals considered the question of what constitutes a hazard of occupational pneumoconiosis and concluded that “a ‘hazard’, as contemplated by the statute, consists of any condition where it can be demonstrated that there are minute particles of dust in abnormal quantities in the work area.” The Meadows court, however, stopped short of providing any insight into what constitutes “abnormal quantities” of dust except to note that abnormal quantities of dust can exist even

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87 W. Va. Code § 23-4-1 (1978 Replacement Vol.); It should be noted that this section was amended effective July 1, 1976, to add language recognizing exposure during five of the fifteen years immediately preceding the date of last exposure as an acceptable basis for recovery. Prior to July 1, 1976, the threshold issue was whether “the employee has been exposed to the hazards of occupational pneumoconiosis in the State of West Virginia over a continuous period of not less than two years during the ten years immediately preceding the date of his last exposure to such hazards.”
88 Id.
90 Id. at 139.
though such quantities are "less than would be customary in many other industries such as coal mining."\textsuperscript{91}

Since early 1977, the present court has been afforded several opportunities to address the issue of "abnormal quantities"; however, it has consistently chosen not to rule on this issue. In \textit{Lewis v. Workmen's Compensation Commissioner},\textsuperscript{92} the employer presented the court with an opportunity to define "abnormal quantities" as "harmful quantities." The case dealt with an industrial workplace from which the employer had attempted to introduce results of atmospheric tests showing that the level of dust particles in the air was less than one-fifth of the established "threshold limit value" or harmful level for the particular dusts involved.\textsuperscript{93} The Commissioner had disallowed the introduction of this evidence because the employer's expert performed the tests subsequent to the time period in issue, although the record indicated that conditions in the workplace had remained substantially unchanged. Thus, the court was presented with a case in which "hazard" could be defined in terms of an objective standard employing scientific measurement. Nevertheless, it elected to deny review.\textsuperscript{4}

In \textit{Schlaegel v. Workmen's Compensation Commissioner},\textsuperscript{95} a case similar to \textit{Lewis}, the employer asked the court to review the Appeal Board's refusal to reject an application for benefits on the ground that the employee had not been exposed to the hazards of occupational pneumoconiosis as required by law. The employee spent approximately seventy-five percent of his work time from 1953 to 1969 and approximately ninety percent of his work time from 1969 until March 7, 1974, the date he filed his application for benefits, in a shop which contained no internal dust source. The

\begin{itemize}
\item \textsuperscript{91} Id. at 140.
\item \textsuperscript{92} No. 10052 (appeal denied March 15, 1977). The factual summary which follows in the text is taken from Appellant's Petition for Appeal and Note of Argument.
\item \textsuperscript{93} The threshold limit value relied on was a standard for respirable or nuisance dust testified to by the employer's expert witness. The standard used was the same threshold limit value as that promulgated by the Occupational Safety and Health Administration (OSHA). \textit{See} note 96 \textit{infra}.
\item \textsuperscript{94} While the admissibility of results from atmospheric tests was not addressed by the court in this case, other courts have recognized the efficacy of such test results. \textit{See}, \textit{e.g.}, Kernaghan v. Sunshine Mining Co., 73 Idaho 106, 245 P.2d 806 (1952); Payne v. Workmen's Comp. Dir., 149 W. Va. 316, 140 S.E.2d 793 (1965).
\item \textsuperscript{95} No. 10213 (appeal denied March 22, 1977). The factual summary which follows in the text is taken from Appellant's Petition for Appeal and Note of Argument.
\end{itemize}
only source of dust alleged by the employee to have affected the air in the shop was from an outside operation. That dust was present only during the summer months when: the shop doors were open, it was not raining, the outside source was in operation, and the wind was blowing from the outside source toward the shop. Even then the employee indicated that upon detection of dust entering the shop, the door would be closed promptly. The employer succeeded in introducing into the record the results of tests showing that the level of dust particles in the air in the shop was approximately one-fifth of established threshold limit (or harmful) values. The Supreme Court of Appeals again denied review.

Thus, even though the term "abnormal quantities" is at the heart of the threshold issue in an occupational pneumoconiosis claim, no definition of that term has yet been established by the court. Instead, the pattern of the court's review suggests that virtually any amount of dust in the work environment will be deemed sufficient exposure, thus rendering the statute's use of the term "hazard" meaningless.

The leading case in West Virginia bearing upon the definition of "a continuous period of not less than two years" is Richardson v. Workmen's Compensation Commissioner, which was decided by the Supreme Court of Appeals in 1953. In that case, the court stated:

The phrase "continuous period" or word "continuous" as used in the statutory provisions, means reasonable continuity, when related to conditions surrounding the employee's exposure to the hazard of the disease silicosis. To give the phrase or word a

The threshold limit values relied upon by the employer were the standards for exposure to inert or nuisance dusts promulgated by the Occupational Safety and Health Administration (OSHA) of the United States Department of Labor pursuant to the Occupational Safety and Health Act of 1970. 29 U.S.C.A. §§ 651-678 (1970). Those standards appear in 29 C.F.R. § 1910.1000, Table Z-3 (1977). Although the court denied review in Lewis and Schlaegel, it has sanctioned the use of similar standards in a hearing loss case. Myers v. Workmen's Comp. Comm'r, 239 S.E.2d 124 (W. Va. 1977). In Myers, the court took judicial notice of noise standards promulgated under the Federal Coal Mine Health and Safety Act of 1969 as amended. 30 U.S.C.A. § 801-961 (Supp. 1978). The court then observed that the record did not show the claimant's actual noise exposure. Justice McGraw, writing for the court, took notice of a publication showing average noise levels in claimant's job and noted that the average exceeded the federal standard. Since the employer did not give evidence of the actual noise level, the court found that "[t]he natural inference, arising from all the circumstances, is that the documentary evidence available to the employer was unfavorable." Id. at 127.

137 W. Va. 819, 74 S.E.2d 258 (1953).
literal meaning and require an uninterrupted period of 2 years in one instance and an interrupted [sic] period of 60 days in the other, whichever the case may be, would require that before an employee could be eligible for compensation benefits an account of silicosis, that he should have worked on Sundays, holidays, during periods of temporary illness and work stoppages, beyond the employee's control. If such interruptions occurred, the continuity of the exposure to the hazard of silicon dioxide dust would be interrupted. Nevertheless, such interruption, as in the instant case, may not prevent the onslaught of the disease silicosis.11

While the court clearly pointed out in Richardson that "continuous" exposure need not occur over consecutive days, the meaning of the term "continuous" has been significantly broadened by the present court in Jarrell v. Workmen's Compensation Commissioner.99 In Jarrell, the claimant worked in West Virginia from 1935 to 1953 during which time he primarily operated a conveyor inside a coal mine and worked on a coal tipple. The claimant stopped working in the mines from 1953 until December 10, 1971, when he took a job as a "dust technician." From 1953 to 1971, claimant suffered no exposure to the hazards of occupational pneumoconiosis. As a dust technician, the claimant worked mainly in an office near a mine. About once a week, the claimant entered the mine and remained there for approximately five hours. During the first two or three months of his employment in this capacity, the claimant went underground daily. The claimant filed his application for occupational pneumoconiosis benefits on June 19, 1974. The employer challenged claimant's application for benefits and argued that claimant had not been exposed continuously to the hazards of occupational pneumoconiosis for a period of two years during the ten years immediately preceding the filing of his claim. While conceding that his exposure was limited to once per week, the claimant relied upon Richardson and contended that his exposure had been reasonably continuous.

In its per curiam opinion, the court held:

[The evidence, when construed in accordance with the principal [sic] enunciated by this Court in the case of Richardson v. State Compensation Commissioner, 137 W. Va. 819, 74 S.E.2d

99 Id. at 826, 74 S.E.2d at 262.
98 No. 13998 (per curiam Nov. 22, 1977). The factual summary which follows in the text is taken from Appellant's Petition for Appeal and Note of Argument.
indicates that the claimant was exposed to the hazards of occupational pneumoconiosis over a continuous period of not less than two years during the ten years immediately preceding the date of his last exposure to such hazards . . . .

106 Jarrell v. Workmen's Comp. Comm'r, No. 13968, slip op. at 4 (W. Va. Nov. 22, 1977). While not at issue in Jarrell, the Richardson decision suggests that even though continuity of exposure is not interrupted by absences beyond the claimant's control, the claimant must nevertheless have actual exposure to the hazards of occupational pneumoconiosis for the statutorily prescribed time periods.

In Richardson, the claimant was employed in a mine from June 10, 1943 to September 8, 1948, more than five years. He worked underground off and on for approximately two more years for a total of seven years in the ten year period. No question was raised as to the two year continuous exposure requirement, and claimant apparently had a significant amount of exposure within the ten year period.

The principal question considered in Richardson was whether claimant had filed his claim within two years (now three years) from and after his last continuous period of sixty days exposure to the hazards of occupational pneumoconiosis. The court found that claimant was actually employed in the mine from June 3, 1949, through July 27, 1949, during which time he actually worked for a total of nineteen days, and from August, 1949, through March 18, 1950, during which time he actually worked fifty-five days. Therefore, the total time of actual exposure in the mine was seventy-four days, apparently broken up by periods of illness, work stoppages, and, of course, weekends and holidays, all matters beyond claimant's control. The claimant filed his application for benefits on July 27, 1951.

In construing the requirement of sixty continuous days, the court indicated that the word "continuous" in the statute does not mean "consecutive" but rather means "reasonable continuity." Having defined the term "continuous" in this manner, the court then examined the facts of the case to see whether the claimant's actual exposure occurred for the requisite time period.

Clearly, the court in Richardson calculated the number of days that the claimant was actually exposed in the only reasonably continuous period of exposure within the statutory time period. Because claimant had seventy-four days of such actual exposure broken up only by matters beyond his control, the court held that he had satisfied the statutory filing requirement. It seems clear that the result would have been different had claimant's total actual exposure been less than sixty days.

Accepting the court's indication that its construction of continuous would also apply in the construction of the requirement of two continuous years exposure in the ten years immediately preceding the date of last exposure, it also seems clear from Richardson that the court would have required 730 days or two years of actual exposure had that been the issue. Although the court holds that periods of illness, strike, etc., do not break up an otherwise continuous exposure period, neither are such periods considered part of the six month or two year exposures necessary to satisfy the statute. Were the court's decision to be interpreted otherwise, a workman could be held to have two continuous years of exposure in a situation where he worked one day, was off with an illness for 728 days, and then worked one further day. That is, two days' exposure interrupted by 728 days of absence would be deemed exposure for two continuous years. Richardson v. State Comp. Comm'r, 137 W. Va. 819, 74 S.E.2d 258 (1953). While the Richardson decision seems clearly to
The foregoing language from Jarrell evidences a questionable reading of the Richardson opinion. Richardson only holds that periods when a claimant is not working due to matters wholly beyond his control will not be held to disrupt the continuity of exposure. The Richardson court in no way suggested that an individual who is not exposed on each day he actually works can be said to have been continuously exposed.

2. Medical Considerations

At the medical stage of the development of an occupational pneumoconiosis claim, the threshold issue is as follows:

[whether] employees have been exposed to the hazards of occupational pneumoconiosis or other occupational disease and in this State have contracted occupational pneumoconiosis or other occupational disease, or have suffered a perceptible aggravation of an existing pneumoconiosis or other occupational disease . . . .

This language was interpreted in 1962 by the Supreme Court of Appeals in Turner v. Workmen's Compensation Commissioner and Garges v. Workmen's Compensation Commissioner. In Turner and Garges, the court held that an employer cannot be charged with an award for silicosis or other occupational disease unless the claimant demonstrates that the disease was actually

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require two years of actual exposure, although that two years may be acquired over a longer period due to temporary interruptions beyond the employee's control, Jarrell implies that any exposure resulting from employment over a two year period may be sufficient. The court, however, may not have been squarely presented with this issue in Jarrell.

101 W. VA. CODE § 23-4-1 (1978 Replacement Vol.).
103 147 W. Va. 11, 123 S.E.2d 886, aff'd on rehearing, 147 W. Va. 188, 126 S.E.2d 193 (1962).
104 Prior to July 1, 1969, the Act extended coverage to "silicosis and any other occupational disease . . . ." Act of Mar. 10, 1967, ch. 203, 1967 W. Va. Acts 1223, 1224. The silicosis law contained hazardous exposure requirements similar to the present day occupational pneumoconiosis requirements. Specifically, hazardous exposure was defined as "the exposure of an employee in the course of his employment to a working condition in which the air contains such a concentration of silicon dioxide dust that the breathing of such air by a person over a long period of time would be likely to cause him to contract the disease of silicosis." Id. Article 4, section 1 of the Act was amended effective July 1, 1969, to substitute the term "occupational pneumoconiosis" for "silicosis". Act of Mar. 8, 1969, ch. 152, 1969 W. Va. Acts 1267, 1270. The definition of hazardous exposure was deleted.
contracted or perceptibly aggravated while he was working for the employer whose account is charged.

The present court, however, reconsidered this question in *Maynard v. State Workmen's Compensation Commissioner* and announced important new rules governing the liability of successive employers of a claimant seeking occupational pneumoconiosis benefits. The court in *Maynard* overruled *Turner* and *Garges* and held that an employee who has worked for multiple employers in West Virginia, and has contracted occupational pneumoconiosis, need not prove to what extent each employer contributed to the disease as a prerequisite to compensation. Instead, the court directed the Commissioner to hold the employers jointly liable for the compensation charges. The further importance of this decision arises from the court's instruction that the Commissioner apportion the charges in accordance with the employee's total period of employment with each employer and the relative hazards present in each work environment.

In *Maynard*, United States Steel Corporation had taken over operations at a mine formerly run by Crystal Block Coal Company. As part of the changeover, United States Steel instituted a very effective dust abatement program which significantly reduced dust concentrations. The claimant in *Maynard* had worked for Crystal Block for fourteen years and had contracted occupational pneumoconiosis before the take-over by United States Steel. After working two and one-half years for United States Steel, the claimant filed an application for benefits. The Commissioner granted an award but charged United States Steel with more than eighty-five percent of those benefits. In reversing the apportionment, the court directed the Commissioner to consider the period of time that the claimant had worked with each employer and the working conditions throughout each employ-

106 The pertinent language of W. Va. Code § 23-4-1 (1978 Replacement Vol.) has not changed materially from the date of the *Turner* and *Garges* cases to the present.
107 239 S.E.2d at 508.
108 Id.
109 Id. at 509-09.
110 Id. at 505, 509.
111 Id. at 509.
112 Id. at 505.
113 Id.
114 Id.
In response, the Commissioner reduced the assessment against United States Steel to less than fifteen percent of the total award. Although the court, to some extent, expanded employer liability in *Maynard*, it also offered employers reduced compensation charges as an incentive to reduce industrial health hazards. Here, the court's decision gives effect to clear statutory language which had consistently been ignored by the Commissioner and the Appeal Board.

Pursuant to the holding in *Maynard*, an employee who has filed a timely application is now entitled to compensation if (a) he has been exposed to the hazards of occupational pneumoconiosis for the requisite statutory period, and (b) either he has contracted occupational pneumoconiosis in this state or has suffered a perceptible aggravation of the disease. If the employee meets both criteria, then all of his employers who exposed him to the hazards of occupational pneumoconiosis are chargeable for compensation payments, provided that they employed him for at least sixty days during the three years prior to his date of last exposure. Once the chargeable employers are ascertained, however, the total employment history with each employer is considered and not just the employment history within the three year period.

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115 Id. at 508-09.
116 Id. at 509.
117 W. VA. CODE § 23-4-1 (1978 Replacement Vol.), provides, in part: "[T]he commissioner may allocate to and divide any charges resulting from such claim among the employers by whom the claimant was employed for as much as sixty days during the period of three years immediately preceding the date of last exposure to the hazards of occupational pneumoconiosis."
118 Prior to *Maynard*, allocations were made among multiple employers based solely on the relative time of exposure with each employer during the three year period immediately preceding the date of last exposure. The inequity of this approach is illustrated by the following example: Employer A employs claimant for twenty years ending on December 31, 1975. Employer B employs claimant for two years, from January 1, 1976, through December 31, 1977. Claimant files his claim on December 31, 1977. Prior to *Maynard*, the allocation would have been 66 2/3 percent to Employer B who had only two years of exposure and 33 1/3 percent to Employer A who had twenty years of exposure, but only one year in the applicable three year period. As a result of *Maynard*, the allocation in the same case, assuming the same degree of exposure with each employer, would be approximately 90.9 percent to Employer A and 9.1 percent to Employer B, clearly a more equitable allocation. In addition, the Commissioner must now consider the relative degree of exposure with each employer. See text accompanying notes 115-16 *supra*. The allocation based on degree of exposure is bound to be somewhat arbitrary and is sure to cause problems for the Commissioner. Nevertheless, the court's ruling in *Maynard* is clearly in line with the statute. W. VA. CODE § 23-4-1 (1978 Replacement Vol.).
C. Limitations on Filing Claims

In *Lester v. State Workmen's Compensation Commissioner*, the court was presented with the question of whether an occupational pneumoconiosis claim filed after the period of limitation in effect on the claimant's date of last exposure was rendered timely by a legislative extension of the limitation period which became effective before the original limitation period had expired. The court observed that there are two conflicting principles involved in deciding this issue in the context of workmen's compensation law. The first is the generally recognized principle that the statute in effect at the date of injury is controlling. The second is the principle that new statutes dealing only with procedural matters apply both to already accrued and to future actions.

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120 Act of Mar. 8, 1969, ch. 152, 1969 W. Va. Acts 1267, 1293, in effect on March 13, 1970, the claimant's date of last exposure to the hazards of occupational pneumoconiosis, provided that all applications for occupational pneumoconiosis benefits "must be . . . filed . . . within three years from and after the last day of the last continuous period of sixty days or more during which the employee was exposed to the hazards of occupational pneumoconiosis . . . ."
121 On July 1, 1970, and again on July 1, 1971, Act of Mar. 13, 1971, ch. 177, 1971 W. Va. Acts 969, was amended to add an alternative limitation period. The court, in *Lester*, observed that the legislature eliminated "all time limitations on filing with the exception that a claim must be filed within three years from and after the employee's occupational pneumoconiosis was made known to him by a physician or which he should reasonably have known, whichever shall last occur." 242 S.E.2d at 444-45. The legislature, however, did not eliminate the existing limitation provision, but merely added the language referred to by the court as an alternative limitation on filing.
123 242 S.E.2d at 446. *Consentina v. State Comp. Comm'r*, 127 W. Va. 67, 31 S.E.2d 499 (1944); *Proffitt v. State Comp. Comm'r*, 108 W. Va. 438, 151 S.E. 307 (1930); *Tackett v. Ott*, 108 W. Va. 402, 151 S.E. 310 (1930); *McShan v. Heaberlin*, 105 W. Va. 447, 143 S.E. 109 (1928). In *Consentina*, the statute involved dealt with the authority of the Commissioner to grant further awards to individuals injured prior to March 7, 1929. The court observed that the statute was more than a statute of limitations in that it acted against a public officer, the Commissioner, to prohibit him from acting. 127 W. Va. at 74-75, 31 S.E.2d at 503. The language of the court's decision, however, does not suggest that the decision would have been different had the statute been purely one of limitation.
The court referred to a line of cases from other jurisdictions which have held that statutes of limitation "are merely procedural and remedial in nature and are applicable to claims not barred under the original limitation period at the effective date of the statute enlarging the limitation period." The court then adopted the "majority view."

Having concluded that the better view is that statutes of limitation in the workmen's compensation context should apply to all claims not previously barred when the statute is enacted, the court considered the question of whether such a construction can be constitutionally applied. The court noted two constitutional issues: (1) whether such a construction "unconstitutionally impairs the obligation of the contract;" and (2) whether an employer has a vested right in the statute of limitations which is in effect on the date of the employee's injury.

In regard to the former issue, the court rendered a rather sweeping rejection of the contract theory of workmen's compensation law. The decision dealt at length with the origin of voluntary workmen's compensation statutes and the gradual evolution of present-day mandatory coverage. The court stated that numerous earlier West Virginia decisions had advanced the contract theory but observed that these decisions arose out of the original voluntary coverage of the Workmen's Compensation Act.

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114 242 S.E.2d at 446 and cases cited therein.
115 Id. The court expressly disapproved the holding in Sudraski v. Workmen's Comp. Comm'r, 116 W. Va. 441, 181 S.E. 545 (1935), where it was held:
    A limitation qualifying a special statutory right . . . is generally held to be unaffected by the disabilities and excuses which allay ordinary statutes of limitations, and to be such an inherent part of the statute which creates the right, that the right itself does not survive the limitation.
    116 W. Va. at 443, 181 S.E. at 546. The court in Lester noted that "[t]he literal application of this rule would preclude fraud, or the equitable principles of waiver and estoppel from tolling the limitation periods under the Act." 242 S.E.2d at 446. The court concluded that Sudraski was "unecessarily rigid and contrary to the humanitarian purposes" of the Workmen's Compensation Act and concluded that there was no reason to treat the limitation provisions of the Workmen's Compensation Act differently from other statutes of limitation. Id. at 447.

116 242 S.E.2d at 447.
117 Id. at 451.
118 Id. at 447-50.
119 Id. at 450 n. 13 and cases cited therein.
120 The court correctly observed that the earliest decision on the question, Gooding v. Ott, 77 W. Va. 487, 87 S.E. 862 (1916), clearly distinguished the elective
The court expressly disapproved its long line of prior decisions holding that workmen's compensation coverage is based on contract. One of those cases, *Loveless v. Workmen's Compensation Commissioner*,¹¹ decided only seven years prior to *Lester*, dealt with a similar question. In *Loveless*, the claimant had been awarded a thirty percent permanent partial disability award for which payment was last made in June of 1969. Prior to July 1, 1970, claimants were permitted to reopen permanent disability claims within one year of the last payment on the award.¹² On July 1, 1970, the reopening provision was extended to two times within five years after the last payment in any permanent disability case.¹³ Claimant sought to reopen his claim for further consideration in November 1970, but his petition to reopen was denied.¹⁴

The court in *Loveless* stated that the contractual nature of workmen's compensation statutes was well settled and that giving retroactive effect to such statutes would operate to impair the obligations of the contract.¹⁵ Writing for the court, Justice Berry observed:

> It is true that purely remedial statutes which in no way affect substantial rights are held to be retroactive in their operation. However, it has been held that statutes of limitation are not purely remedial statutes and are no exception to the rule that they operate prospectively.¹⁶

Despite *Loveless* and the long line of contract theory cases preceding it, the court, in *Lester*, held that rights and duties under the Workmen's Compensation Act will henceforth be based on the idea of status; that is, on the law itself.¹⁷ Having concluded that

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¹⁴ 155 W. Va. at 265-66, 184 S.E.2d at 128-29.
¹⁵ Id. at 267, 184 S.E.2d at 129.
¹⁶ Id.
¹⁷ 242 S.E.2d at 451. The *Lester* decision differs from *Loveless* in that in *Lester*, the claimant's claim was not barred by the prior statute of limitations at the time the new limitation provision became effective, while in *Loveless* the original limitation period had expired before the amendment became effective. Thus, the court in *Lester* dealt with survival of an existing claim, while the court in *Loveless* faced a question of revival of a barred claim. The *Lester* court was not called upon to consider the question of barred claims but, nevertheless, chose to comment on the question. See note 139 infra.
workmen's compensation law is no longer based on contract, the
court finally considered the only other possible constitutional bar
to its construction of the statute—the question of whether an em-
ployer has a vested right in the limitation period in effect on the
date of injury. The decision was that no person has a "vested
right in the running of a statute of limitations unless it has com-
pletely run and barred the action."  
The court went on to conclude that since the employer ac-
quired no vested right in the statute of limitations in effect on the
date of injury, the claimant could avail himself of the amended
statute and, therefore, his claim was timely filed. The court's
decision, although a drastic reversal of the position consistently
advanced by prior courts, appears to be in line with the majority
of jurisdictions.  
The more important issue raised by the decision is how the
court will treat the situation where a claimant's claim is barred by
the existing statute of limitations before the statute is amended by
the legislature. The court's decision implies that since the limita-
tion period is not to be considered a part of the substantive rights

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135 Id. at 452. This would seem to approve the decision in Loveless, note 131 supra. See note 137 supra. In a footnote to its decision in Lester, however, the court observed:

We don't reach the issue of reviving an expired claim here, but *compare* Campbell *v.* Holt, 115 U.S. 620, 6 S. Ct. 209, 29 L. Ed. 483 (1885), holding a state legislature consistent with the Fourteenth Amend-
ment may repeal or extend a statute of limitations even after the right of action is barred under such statute, . . . *with* William Danzer & Co. *v.* Gulf & Ship Island R., 268 U.S. 633, 45 S. Ct. 612, 69 L. Ed. 1126 (1925) and Davis *v.* Mills, 194 U.S. 451, 24 S. Ct. 692, 48 L. Ed. 1067 (1904), holding a state legislature may not extend a period of limitation after it
has expired where the limitation period is considered a part of the sub-
stantive right.

242 S.E.2d at 452 n. 15.  
136 242 S.E.2d at 452. Although apparently not necessary to its decision, the
court expressly observed that its interpretation did not constitute a retroactive
application of the law. The court, quoting from Sizemore *v.* Workmen's Comp.
Comm'r, 219 S.E.2d 912 (W. Va. 1975), said:

A law is not retroactive merely because part of the factual situation
to which it is applied occurred prior to its enactment; only when it oper-
ates upon transactions which have been completed or upon rights which
have been acquired or upon obligations which have existed prior to its
passage can it be considered to be retroactive in application.

242 S.E.2d at 462.  
137 242 S.E.2d at 446 and cases cited therein.
of the employer, a party whose claim is otherwise barred may have it revived by a subsequent amendment to the limitation period.\textsuperscript{11} This is inconsistent with the court's statement that rights in a statute of limitations become vested after the statute has run. The final resolution of this question will have to await a proper case. Although \textit{Lester} involved an occupational pneumoconiosis claim, it seems clear that until the court decides a case on point the principle announced in \textit{Lester} will be equally applicable to other limitation provisions in the Act, at least insofar as those provisions are deemed to be procedural in nature.

D. Benefits Payable After a Permanent Total Disability Award

In the case of \textit{Cropp v. Workmen's Compensation Commissioner},\textsuperscript{13} the court ruled that a permanent total disability award does not preclude the payment of additional workmen's compensation benefits, in particular, temporary total disability benefits for a subsequent injury. The claimant in \textit{Cropp} had received severe burns over most of his body as a result of an industrial accident in 1965 and was granted a permanent total disability award. Subsequently, the claimant recovered sufficiently so that he could return to his previous employment. In 1975, the claimant sustained an injury to his leg while at work. The Commissioner denied claimant's application for compensation benefits, holding that the prior permanent total disability award precluded an award of any additional compensation. The Appeal Board affirmed the Commissioner's action.

On appeal, the employer argued that even though the leg injury was compensable, Article 4, section 6 of the Act prescribes the maximum weekly benefits payable to a worker, and precludes the claimant from receiving additional compensation.\textsuperscript{14} The court was

\textsuperscript{11} 236 S.E.2d 480 (W. Va. 1977).

\textsuperscript{12} Id. at 446, 452 n. 15. See discussion at note 139 \textit{supra}.

\textsuperscript{13} W. VA. CODE § 23-4-6(b) (1978 Replacement Vol.) provides as follows:
If the injury causes temporary total disability, the employee shall receive during the continuance thereof weekly benefits as follows: A maximum weekly benefit to be computed on the basis of \[66 \frac{2}{3}\%\] of the average weekly earnings, wherever earned, of the injured employee, at the date of injury, not to exceed the percentage of the average weekly wage in West Virginia, as follows: On or after . . . [July 1, 1975], one hundred per cent.

Article 4, section 6(b) was amended, effective July 1, 1978, to provide that the maximum weekly benefit was to be computed on the basis of 70% of the average
not persuaded by this argument, however, and, in his opinion for
a unanimous court, Justice Miller stated that the claim was clearly
compensable and that there are no provisions in the Act which
directly limit the compensability of a second injury by virtue of the
claimant having received a life award.\textsuperscript{146}

The court, in \textit{Cropp}, cited \textit{Mullens v. Workmen's Compensa-
tion Commissioner},\textsuperscript{146} as implicitly recognizing the rule that a life
award does not operate to terminate medical reimbursement bene-
fits for the same injury. The \textit{Cropp} court indicated that it found
no reason to distinguish that situation from the present case in
which the medical expenses related to a second industrial acci-
dent.\textsuperscript{147}

The court next considered the claimant's right to temporary
total disability benefits after receiving a life award. Here the court
was squarely confronted with the language of Article 4, section 6(k)
of the Act and the decision in \textit{Dunlap v. Workmen's Compensation
Director}.\textsuperscript{148} In \textit{Dunlap} the issue presented was whether temporary
total disability benefits are to be deducted from a permanent total
disability award. The claimant maintained that no offset of the
temporary benefits was required against the total award. Because
benefits for the life award would be payable from the date of the
injury, the net effect of claimant's contention would have been to
allow the claimant to receive temporary and permanent disability
benefits for the same period. The court in \textit{Dunlap} ruled that Ar-
ticle 4, section 6(h) prohibited this double payment.\textsuperscript{149} When faced
with this argument in \textit{Cropp}, the court refused to overrule \textit{Dunlap}
and thereby emasculate Article 4, section 6(k). Rather, the court
announced that \textit{Dunlap} was not controlling and that Article 4,
section 6(k) does not apply where there are two separate, compens-
able injuries.\textsuperscript{150}

The language of the \textit{Cropp} opinion suggests that to preclude
additional benefits where an employee has received a life award

\textsuperscript{146} 236 S.E.2d at 482, 484.
\textsuperscript{147} 233 S.E.2d 604 (W. Va. 1976).
\textsuperscript{148} 149 W. Va. 266, 140 S.E.2d 448 (1965).
\textsuperscript{149} 149 W. Va. 271, 140 S.E.2d 452. Article 4, section 6(h) of the Act, in
effect at the date of the \textit{Dunlap} decision is now codified in W. Va. Code § 23-4-
\textsuperscript{150} 236 S.E.2d at 463.
would discourage the employee from all attempts to re-enter the job market, or would unfairly penalize those who are successful in obtaining employment and are subsequently injured. It seems unlikely, however, that many aspirants to the job market will give consideration in their decision to seek employment to whether they will receive disability payments in the event that they are injured. Furthermore, because permanent total and temporary total disability benefits are intended to perform a wage replacement function without completely removing the injured employee's financial incentive to return to work, superimposing benefit upon benefit subverts this purpose.\textsuperscript{51}

While the court in \textit{Cropp} was concerned with the payment of temporary total disability benefits for a second injury where a claimant has previously received a life award, there is nothing in the language or rationale of that decision to indicate that its holding should be limited to temporary benefits. \textit{Cropp} has opened the door to awards for permanent partial disability to claimants who have already received permanent total awards and may even permit duplicate permanent total awards.

\textbf{E. Reopening of Claims}

The standard of proof necessary to reopen a claim is set out in Article 5, sections 1a and 1b of the Act,\textsuperscript{52} which require that a

\textsuperscript{51} See generally 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION at § 57.00 (1978).

\textsuperscript{52} W. VA. Code § 23-5-1a (1978 Replacement Vol.), provides:

In any case where an injured employee makes application in writing for a further adjustment of his claim under the provisions of section sixteen, article four of this chapter, and such application discloses cause for a further adjustment thereof, the commissioner shall, after due notice to the employer, make such modifications or changes with respect to former findings or orders in such claim as may be justified, and any party dissatisfied with any such modification or change so made by the commission shall, upon proper and timely objection, be entitled to a hearing, as provided in section one of this article.

W. VA. Code § 23-5-1b (1978 Replacement Vol.), provides:

If, however, in any case in which application for further adjustment of a claim is filed under the next preceding section, it shall appear to the commissioner that such application fails to disclose a progression or aggravation in the claimant's condition, or some other fact or facts which were not theretofore considered by the commissioner in his former findings, and which would entitle such claimant to greater benefits than he has already received, the commissioner shall, within sixty days from the receipt of such application, notify the claimant and the employer that
claimant's application must establish a prima facie cause for reopening the claim. Historically, this rule has been followed by the court, and the decision of the Appeal Board in permitting or denying a reopening has been upheld unless shown to be clearly wrong.\textsuperscript{133}

In the recent case of Harper v. Workmen's Compensation Commissioner,\textsuperscript{144} the court expounded on the showing that must be made by a claimant to establish a prima facie cause for reopening. The claimant in Harper had previously received a fifteen percent permanent partial disability award for occupational pneumoconiosis. A medical report submitted by the claimant in connection with his application for reopening indicated that the claimant had developed a severe neurotic condition which his physician concluded could be related to pneumoconiosis. The report also stated that the claimant suffered from an arthritic condition and experienced shortness of breath and dizziness.

In reversing the Commissioner and the Appeal Board, the court held that to obtain a reopening of a claim, an employee need only show a prima facie cause; that is, "any evidence which would tend to justify, but not to compel, the inference that the employee has sustained a progression or aggravation of the former injury."\textsuperscript{155} A broad reading of this definition will compel the Commissioner to reopen a claim where the claimant produces any evidence from which a progression of the injury might be inferred. Absent any change in such interpretation, it is reasonable to assume that there will be a significant increase in requests by employees for modification of compensation awards.

F. Horseplay

The Supreme Court of Appeals addressed the issue of the compensability of injuries sustained as a result of horseplay or pranks of fellow employees in the case of Sizemore v. Workmen's

\textsuperscript{144} 234 S.E.2d 779 (W. Va. 1977).
\textsuperscript{155} Id. at 783.
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Compensation Commissioner. The Act requires that for an injury to be compensable, it must occur in the course of and result from the injured worker's employment. In Sizemore, the claimant was struck on his hard hat with a hammer handle by another worker as a prank, and sustained a neck injury. The Commissioner held the claim compensable, but the Appeal Board reversed, holding that the injury was caused by an "assault" and did not result from the claimant's employment.

Historically, the court has held that certain injuries resulting from altercations between employees are not compensable. In Sizemore this line of cases was distinguished from the situation in which an innocent employee is injured in an incident of horseplay. The rule announced by the court is that an innocent victim of horseplay injured during the course of his employment is entitled to workmen's compensation benefits for that injury.

The clear implication of this decision is that in the case of fights, pranks or other similar situations occurring on the job, an analysis of the roles played by the individual participants is to be made, and where an injured employee is a non-aggressor, bystander or otherwise innocent victim, he will be entitled to compensation benefits for his injury.

II. Scope Of The Court's Review

Perhaps even greater than the impact of the Supreme Court of Appeals in the area of interpretation of the Workmen's Compensation Act has been the court's expanding influence in cases in which no legal question is involved—an area in which prior courts have generally avoided review. The court's influence in this area can best be demonstrated by: (1) its expansion of the so-called

154 235 S.E.2d at 473.
13 In Jackson v. Workmen's Comp. Comm'r, 127 W. Va. 59, 31 S.E.2d 848 (1944), the court ruled that an employee who is clearly the aggressor and is injured in an altercation with a fellow employee, is not entitled to compensation benefits. In Claytor v. Workmen's Comp. Comm'r, 144 W. Va. 103, 106 S.E.2d 920 (1959), the court held that where an injury to an employee results from a personal quarrel with a fellow employee, it is not compensable. For a discussion of injuries from a fellow worker's assault as "arising out of the employment," see Comment, 10 WASH. & LEE L. REV. 133 (1953).
108 This holding aligns the West Virginia Supreme Court of Appeals with the majority of jurisdictions that have addressed this claim. See 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 7.10, 23.30 (1978).
"liberality rule," a process already begun by prior courts; and (2) its explicit or implied utilization of the liberality rule to support review and reversal of decisions or denial of review based solely on the court's reconsideration of the evidence.

The "liberality rule" first appeared, in a much different form than it appears today, in the original enactment of the workmen's compensation statute in 1913. The 1913 statute provided:

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.¹⁰¹

Subsequent to the enactment of the first workmen's compensation law and in one of the early decisions in that field by the Supreme Court of Appeals, the court gave the rule a very limited application to evidence. In Poccardi v. Public Service Commission, the court considered a claim in which the claimant had allegedly sustained a hernia from lifting a pipe while at work. The evidence was uncontroverted that claimant was in good health prior to the incident and that lifting the pipe involved unusual physical exertion. The physician who examined claimant was of the opinion that the injury resulted from the strain in lifting the pipe. The court held that where a claimant presents undisputed evidence supporting an apparently meritorious claim, he is entitled to all reasonable inferences raised by that evidence.¹² The court expressly declined to consider the application of the rule to a case in which conflicting evidence is presented.¹²³

¹² 75 W. Va. 542, 84 S.E. 242 (1915). It should be noted that the original Workmen's Compensation Fund was administered by the Public Service Commission. See note 2 supra. The office of State Compensation Commissioner was created in 1915. Act of Feb. 20, 1915, ch. 9, § 1, 1915 W. Va. Acts 52, 55.
¹²³ 75 W. Va. at 545-46, 84 S.E. at 243. The court has consistently reiterated the principle that a claimant is entitled to all reasonable inferences in his favor which arise from undisputed evidence. Watkins v. Workmen's Comp. Comm'r, 114 W. Va. 507, 508, 172 S.E. 715 (1934); Demastes v. Workmen's Comp. Comm'r, 112 W. Va. 498, 501, 165 S.E. 667, 668 (1932); Goble v. Workmen's Comp. Comm'r, 111 W. Va. 404, 408, 16 S.E. 314, 315 (1932); Machala v. Workmen's Comp. Comm'r, 109 W. Va. 413, 155 S.E. 169 (1930); Caldwell v. Workmen's Comp. Comm'r, 106 W. Va. 14, 17, 144 S.E. 568, 569 (1928). In Goble, supra, the court stressed that inferences are permitted only when the facts are undisputed.
The first case to use the term "liberality" in fashioning a rule based on the early statutory provision was Culurides v. Ott\(^6\) decided in 1916. In that case, the court reviewed the denial of compensation to dependents of a deceased workman. The workman's wife and daughter lived on Crete. The claimant's brother originally filed an application on her behalf and then retained an attorney who sent an application to the claimant for her signature. It was not returned and filed until twelve days after the time for filing had expired.

The court held that the Workmen's Compensation Act is to be liberally construed so as to preclude denial of meritorious claims due to technicalities.\(^6\) Clearly, the court's decision was limited to liberality in the construction of the statute and was, by no stretch of the imagination, an evidentiary rule. This interpretation of the liberality rule was given judicial approval as recently as 1977 by the present Supreme Court of Appeals.\(^7\)

By the time the legislature met in 1919, the concept of a liberality rule, at least insofar as statutory construction was concerned, was firmly entrenched in West Virginia law—so firmly, in fact, that it survived the deletion of the supporting language from the workmen's compensation statute. The law, as reenacted in 1919, omitted the term "liberally" and it has not reappeared since.\(^8\) Thus, the only statutory basis for a liberality rule disappeared from West Virginia law nearly sixty years ago, making the tenacity of the rule all the more amazing.\(^9\)

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\(^6\) 78 W. Va. 696, 90 S.E. 270 (1916).
\(^7\) Id. at 699-701, 90 S.E. at 271-72.
\(^8\) Dunlap v. Workmen's Comp. Comm'r, 232 S.E.2d 343, 345 (W. Va. 1977);

W. VA. Code § 23-1-15 (1978 Replacement Vol.), reads as follows:

The Commissioner shall not be bound by the usual common-law or statutory rules of evidence, but shall adopt formal rules of practice and procedure as herein provided, and may make investigations in such manner as in his judgment is best calculated to ascertain the substantial rights of the parties and to carry out the provisions of this chapter.

This language has remained essentially unchanged since 1919. In Whitt v. Workmen's Comp. Comm'r, 153 W. Va. 688, 692, 172 S.E.2d 375, 377 (1970), the court observed that "[t]oday there is no provision in the workmen's compensation law requiring the commissioner, the appeal board, or this Court to apply a rule of 'liberality' either in construing the workmen's compensation law or appraising the evidence in a workmen's compensation case." For an earlier discussion of the Whitt case and the liberality rule, see Comment, 77 W. VA. L. Rev. 370 (1975).
From Culurides to the present, the court has consistently reiterated the application of the liberality rule to statutory construction. Until 1932, the only application of the liberality rule to the evaluation of evidence was the "reasonable inference from uncontroverted evidence" rule first enunciated in Poccardi.

The first major turning point in the judicial development of the liberality rule was the court's decision in Pripich v. Workmen's Compensation Commissioner, decided in 1932. At issue was whether the claimant's physical complaints stemmed from an admittedly compensable injury. The evidence was conflicting; however, doctors who did not ascribe claimant's physical condition to the injury were unable to relate the symptoms to any other specific physical condition. The court held:

Where, in the course of and arising out of his employment, an employee in good health and of strong physique suffers serious physical injury which is followed by serious disabilities, competent physicians differing as to whether the disabilities are attributable to the injury, but only probable or conjectural reasons or causes are assigned by physicians in an effort to explain the disabilities on grounds other than the injury, the presumptions should be resolved in favor of the employee rather than against him.

Obviously, the Pripich decision goes little beyond Poccardi, dealing basically with inferences from uncontroverted evidence. In Fulk v. Workmen's Compensation Commissioner, however, decided one week after Pripich, the court made the bald statement that "[e]vidence should be construed liberally in favor of the claimant," citing Pripich as the only authority. Again, the evidence was essentially uncontroverted, and there was no apparent reason for the court to go beyond Poccardi and Pripich with the foregoing gratuitous language. Thus, the modern liberality rule made its way into West Virginia case law almost by accident.


1111 See notes 163 and 164 supra, and accompanying text.

1111 Id. at 540, 166 S.E. 4 (1932).

1111 Id. at 555, 166 S.E. 5 (1932).

1111 Id. at 556, 166 S.E. at 6.
From the court's decision in *Fulk* to the advent of the present Supreme Court of Appeals, there was little development in the concept of a "liberality rule." The rule was generally applied in cases in which there was no concrete evidence to refute claimant's claim, in other words, essentially undisputed evidence. Perhaps the best statement of the ongoing application of the rule by the court is found in *Sowder v. Workmen's Compensation Commissioner* where the court held:

Although the liberality rule will not take the place of evidence, when a fair and reasonable appraisal of the evidence supports the claimant's position the proof may be considered proper and satisfactory.

The court's statement in *Sowder* does little more than state a mere preponderance of the evidence standard.

Furthermore, in *Pennington v. Workmen's Compensation Commissioner*, the court noted that the liberality rule applied "to the appraisal of evidence in compensation cases." No mention is made of the rule's applicability to the weight of the evidence.

The pre-1977 state of the liberality rule, then, can best be described as giving the claimant the benefit of the doubt in interpreting evidence in cases in which the employer presents no clear evidence to contradict claimant's testimony. The rule was seldom used by the Supreme Court of Appeals as the sole basis for reversing an Appeal Board finding in favor of an employee.

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155 W. Va. 889, 189 S.E.2d 674 (1972).

17 Id. at 893-94, 189 S.E.2d at 677.


The case of *McGeary v. Workmen's Comp. Dir.*, 148 W. Va. 436, 439-40, 135 S.E.2d 345, 347 (1964), is representative of the court's misunderstanding and misapplication of the liberality rule. The court cites *Caldwell v. Workmen's Comp. Comm'n*, 106 W. Va. 14, 144 S.E. 568 (1928), as authority for the proposition that the Commissioner should construe evidence liberally in favor of the claimant. Only a very "liberal" reading of *Caldwell* could reach such a conclusion. *Caldwell* merely requires that the Commissioner accord the claimant reasonable inferences from undisputed evidence.

180 E.g., *Dombrosky v. Workmen's Comp. Dir.*, 149 W. Va. 343, 141 S.E.2d 85 (1965). It should be emphasized that the pre-1977 court rendered some decisions which seem out of line with the general pattern. For example, in *McGeary v. Workmen's Comp. Dir.*, 148 W. Va. 436, 135 S.E.2d 345 (1964), the court considered a case in which five physicians had recommended awards varying from forty percent permanent partial disability to permanent total disability. The court applied the liberality rule and ordered a permanent total disability award. However, the court observed that the physical findings of all five doctors were substantially
Since January 1, 1977, however, approximately twenty-five to thirty percent of the decisions of the West Virginia Supreme Court of Appeals have been premised largely on the application of the liberality rule. In effect, the court, although acknowledging the principle that decisions of the Workmen's Compensation Appeal Board will be upheld unless clearly wrong, has chosen to substitute its reading of the facts for that of the Commissioner and the Appeal Board. Thus, the court has taken a much more active role in review of workmen's compensation cases than have prior courts. Many of the court's decisions have been per curiam and have included little or no discussion of the facts.

Interestingly, in one of its early decisions the court showed a clear understanding of the origin of the liberality rule and its limitation to statutory construction. In *Harper v. Workmen's Compensation Commissioner*, Justice Miller referred to numerous decisions of the court holding the Act to be remedial and subject to liberal construction. The court cited *Culurides v. Ott*, as the case which molded the liberality rule which "continues with unabated force to govern the construction of the Act to the present day . . . ." Finally, Justice Miller indicated that the legislature impliedly reinforced the liberality rule in 1971 "when it stated, 'It is also the policy of this chapter to prohibit the denial of just claims of injured or deceased workmen or their dependents on technicalities.'"

In *Myers v. Workmen's Compensation Commissioner*, the court dispelled any idea that it considered the liberality rule to apply only to statutory construction. Justice McGraw, writing for a unanimous court, stated that, although the claimant has the burden of proof in a workmen's compensation claim, he need not disprove all non-employment causes. That is, he need not "prove to the exclusion of all else the causal connection between the injury
and the employment."\textsuperscript{117} This statement standing alone is certainly correct law and does nothing more than state the standard of proof in civil cases generally. The court, however, went on to hold:

A spirit of liberality is to be employed in applying the provisions of the Workmen's Compensation Act and in construing the evidence. This principle dictates that this Court examine the record and give the claimant the benefit of all reasonable inferences the record will admit favorable to him.\textsuperscript{118}

The holding in Myers goes a step beyond the Pripich decision\textsuperscript{119} which essentially limited the inferences to uncontroverted evidence. In Lanier v. Workmen's Compensation Commissioner,\textsuperscript{120} however, decided six days prior to Myers, the court cited Pripich favorably and reversed the Appeal Board's decision because no evidence other than probable or conjectural evidence was offered to explain claimant's disability on grounds other than the compensable injury.

It appears, then, that the liberality rule, as applied by the present court, is a flexible rule which can be molded to fit differing factual situations and can be used to justify the reversal of decisions which the court feels are incorrect, where no other basis for reversal exists. A comparison of several cases is instructive.

In Hairston v. Workmen's Compensation Commissioner,\textsuperscript{121} the claimant petitioned the Commissioner to reopen his claim in which he had previously been granted a thirty percent award. A physician's report recommending an additional two percent award accompanied the petition. The Commissioner referred claimant to an independent examiner who found no progression, and the Commissioner denied a further award.

The claimant objected and presented two additional physicians' reports, both of which found progression. The employer produced no further evidence. The Commissioner again denied an additional award, and the Appeal Board affirmed. The Supreme

\textsuperscript{117} Id. at 127. See also Workman v. Workmen's Comp. Comm'r, 236 S.E.2d 236 (W. Va. 1977), which clearly establishes both a statutory construction liberality rule and an evidentiary liberality rule.

\textsuperscript{118} 239 S.E.2d at 126.

\textsuperscript{119} 112 W. Va. 540, 166 S.E. 4 (1932). See text accompanying notes 172-73 supra.

\textsuperscript{120} 238 S.E.2d 687 (W. Va. 1977).

\textsuperscript{121} 234 S.E.2d 494 (W. Va. 1977).
Court of Appeals reversed with a one-sentence per curiam opinion based solely on the fact that three of the four physicians found that claimant had suffered progression in his condition. Therefore, the evidence "clearly preponderated in favor of claimant."\textsuperscript{102}

In contrast, the court refused even to hear Stanley v. Workmen's Compensation Commissioner,\textsuperscript{103} a case with virtually the same factual situation in reverse as Hairston. In Stanley, the Commissioner's examiner recommended a forty percent award which was granted. The employer objected. Evidence was introduced from four physicians, all of whom said the award should not exceed twenty-five percent. One of the physicians was the claimant's doctor. The Commissioner affirmed his original award, as did the Appeal Board. The court then refused to hear the case despite the overwhelming "weight" of the evidence in favor of the employer's position. Since no reasons are given by the court for refusing to hear appeals, one can only speculate that the liberality rule was applied.

Likewise, in Fetty v. Workmen's Compensation Commissioner,\textsuperscript{104} the court denied review of a finding of compensability despite substantial evidence to the contrary. Claimant testified that he had injured his back at work and had no previous history of back injury. He further testified that he had told his foreman and a fellow worker about the injury. He further testified that he had told his foreman and a fellow worker about the injury. Neither remembered the conversation.

\textsuperscript{102} Id. There is certainly nothing shocking about the Hairston opinion. In fact, the evidence does, on its face, appear to preponderate, but it is a fundamental principle of workmen's compensation law in this state that physicians are not authorized to fix the degree of disability in any case. Haines v. Workmen's Comp. Comm'r, 151 W. Va. 152, 150 S.E.2d 883 (1966); McGary v. Workmen's Comp. Comm'r, 148 W. Va. 426, 135 S.E.2d 345 (1964). That power is granted to the Commissioner alone and to carry out his responsibility, he must consider the physical findings of the examining physicians and determine from all of the evidence what award, if any, the claimant should receive. Stewart v. Workmen's Comp. Comm'r, 165 W. Va. 633, 186 S.E.2d 700 (1972); Sisk v. Workmen's Comp. Comm'r, 153 W. Va. 461, 170 S.E.2d 20 (1969). Nowhere in the Hairston opinion does the court qualitatively evaluate the evidence. The court's decision, then, impliedly shifts the power to make an award to the physicians who are in the majority. While a review of the findings of the physicians involved in Hairston might well support the court's decision, the court gives no indication that any such consideration was given.

\textsuperscript{103} No. 10590 (appeal denied May 15, 1978). The factual summary which follows in the text is taken from Appellant's Petition for Appeal and Note of Argument.

\textsuperscript{104} No. 10714 (appeal denied May 1, 1978). The factual summary which follows in the text is taken from Appellant's Petition for Appeal and Note of Argument.
Claimant had completed an insurance application form for the same injury on which he stated that the injury was not based on a work-related accident. Furthermore, claimant's medical history as related to his several treating physicians made no reference to the alleged injury at work. In fact, according to the record, claimant told one doctor he had been injured about one year before the alleged compensable injury. Finally, office records were introduced from a physician who had noted claimant's complaints of low back pain on several occasions, long before the alleged injury.

Despite the apparent weight of the evidence, the court refused to hear the appeal. Again, a tacit application of the liberality rule is suggested.

A third case in which the court denied review was Knox v. Workmen's Compensation Commissioner. Knox was an occupational disease case based on alleged exposure to chemical fumes. The claimant testified that he had been exposed throughout his employment and that he had never made any statements inconsistent with his testimony.

The employer, however, produced the testimony of its plant physician who had examined claimant on numerous occasions. His records indicated that over an eight year period claimant had consistently denied any significant exposure to fumes or any physical problems as a result. Furthermore, claimant and his family physician had prepared non-occupational insurance benefit forms for claimant's lung condition, and claimant received such benefits for twenty-six weeks. Not until after the insurance benefits ran out did claimant file a workmen's compensation claim. Finally, claimant admitted he had smoked one package of cigarettes per day for sixteen years. Both the Commissioner and the Appeal Board found for claimant. The court denied review.

Although the application of the liberality rule can only be surmised in the “review denied” cases, the court has cited the liberality rule as its only justification for reversal in numerous cases. Most are per curiam opinions and are, therefore, difficult.

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113 No. 10002 (appeal denied March 14, 1977). The factual summary which follows in the text is taken from Appellant's Petition for Appeal and Note of Argument.

114 E.g., Lanier v. Workmen's Comp. Comm'r, 238 S.E.2d 687 (W. Va. 1977); Linville v. Workmen's Comp. Comm'r, 236 S.E.2d 41 (W. Va. 1977); Fisher v. Workmen's Comp. Comm'r, No. 13883 (per curiam Nov. 22, 1977); Russell v. Workmen's Comp. Comm'r, No. 13971 (per curiam Nov. 22, 1977); Landers v. Workmen's Comp. Comm'r, No. 13873 (memorandum opinion July 12, 1977); Baldwin
to analyze.\textsuperscript{197} The effect of the court’s willingness to reconsider the facts, however, is an erosion of the principle that the Supreme Court of Appeals will not reverse a finding of fact by the Appeal Board unless it appears from all the evidence in the claim that the Appeal Board’s finding is plainly wrong.\textsuperscript{198} In fact, in \textit{Pirlo v. Workmen’s Comp. Comm’r}, No. 13826 (memorandum opinion June 7, 1977); Townsend v. Workmen’s Comp. Comm’r, No. 13817 (memorandum opinion May 10, 1977). In \textit{Eastwood v. Workmen’s Comp. Comm’r}, No. 14085 (per curiam March 21, 1978), the court applied the rule although noting that the evidence was contradicted in some degree. The decision in \textit{Taylor v. Workmen’s Comp. Comm’r}, No. 13884 (per curiam Dec. 20, 1977), appears to be the only decision in which the court has applied the liberality rule in a claimant’s appeal and found it insufficient to overcome the employer’s evidence. Even in \textit{Taylor}, the decision was not unanimous. Justice McGraw dissented.

\textsuperscript{197} A few, however, are worth mentioning. In \textit{Tompkins v. Workmen’s Comp. Comm’r}, No. 13868 (per curiam Nov. 22, 1977), claimant’s decedent sustained a back injury in 1971 for which he received a forty percent award which was later increased by fifteen percent due to psychiatric reasons. Over the three and one-half years following his injury, he gained sixty-five pounds before dying of a heart attack partially attributable to his increased weight. The court reversed denial of widow’s benefits to claimant and held that the back injury contributed to decedent’s inactivity which, coupled with his eating, put an additional strain on his heart, which, in turn, led to the heart attack. Thus, the death was attributable to the initial injury and was compensable.

In \textit{Hern v. Workmen’s Comp. Comm’r}, No. 13846 (per curiam June 28, 1977), the claimant sustained a back injury on December 25, 1968, which injury was subsequently held compensable. He was referred to the Commissioner’s examiner who found no permanent partial disability, and an order to that effect was entered. Claimant objected and produced a report from an osteopath recommending further treatment and finding a five percent disability at the time. The employer moved, without opposition, to hold the claim open until the treatment was complete. The motion was granted. Claimant agreed to provide a supplemental disability report after the treatment was complete, but did not do so. In 1974, claimant produced the testimony of a physician who had last seen him in 1971, prior to claimant’s further treatment. That physician reported no clinical findings of impairment but recommended a five percent award based on a predisposition to future injuries of the same sort. Finally, in 1975, another physician examined claimant and found no disability.

The Commissioner granted claimant a five percent disability award on February 27, 1976. The employer appealed. The Appeal Board set aside the Commissioner’s order and held that no permanent disability had resulted from the injury.

Claimant appealed to the West Virginia Supreme Court of Appeals. The court originally held that the Appeal Board was clearly wrong in holding the injury not compensable, a holding neither the Commissioner nor the Appeal Board made. Subsequently, the employer petitioned for a rehearing. The rehearing was denied, but the court entered a corrected order citing the liberality rule and reinstating the five percent award.

men's Compensation Commissioner,199 Justice McGraw observed that "[w]hile a finding of fact by the Appeal Board is not to be disturbed unless shown to be clearly wrong, such a rule is not applicable where the facts are undisputed, and the record will admit of reasonable inferences favorable to the claimant."200

Unquestionably, the impact of the present Supreme Court of Appeals has been as great or greater in the field of workmen's compensation law as in any other area. Perhaps its greatest effect within that field has been the further development of the liberality rule into a substitute for evidence on behalf of the claimant. The court has often reviewed the evidence on claimants' appeals and apparently substituted its judgment for that of the Appeal Board and the Commissioner in numerous cases. A likely effect of the court's activity is to increase the number of claimants' appeals and to decrease the number of appeals by employers.201 Certainly the liberality rule as construed by the present court has become a factor to be given great weight by attorneys representing both sides in determining the advisability of an appeal.

It is apparent from a review of decisions since January 1, 1977, that the present West Virginia Supreme Court of Appeals has adopted an activist philosophy at least insofar as workmen's compensation is concerned. The court has entered into areas not ordi-

200 Id. at 454.
201 Such an effect is suggested by a review of the records of the West Virginia Supreme Court of Appeals from January 1, 1973, through September 14, 1978. In 1973, employees and employers sought review of thirty decisions of the Workmen's Compensation Appeal Board. Employee appeals that year accounted for twenty of those thirty cases, while employers requested review of ten cases. These statistics increased slightly in 1974 to a total of thirty-three cases wherein review was requested. Employees appealed in twenty-one of those cases and employers appealed in twelve cases. The 1975 term witnessed a significant increase in the total number of appeals and specifically, in the number of employee appeals. Out of the fifty-seven cases wherein review was requested, nearly seventy-seven percent, or forty-four out of fifty-seven cases, were appealed by employees. Comparing this figure to the previous year's figures, employee appeals doubled. Employers in 1975 sought review of only thirteen cases, an increase of only one case from the previous year. There were fifty-one appeals in 1976, a slight decrease from the total in 1975, but the relative number of appeals taken by employees and employers remained constant—employees still accounted for a much greater percentage of appeals (seventy-one percent) than did employers (twenty-nine percent). The period from January 1, 1977, through September 15, 1978, has not seen an increase in the total number of appeals, but the percentage of appeals prosecuted by employees has shown a significant increase and the percentage of appeals prosecuted by employers has shown a significant decrease over the same time period. See note 3 supra.
narily considered to be within the scope of appellate review. It has given little consideration to the fact-finding role of the Workmen's Compensation Appeal Board, preferring to substitute its own review of the facts. It has also chosen to redefine well-settled statutory interpretations and, in the process, has, on occasion, usurped the role of the legislature. Such a philosophy erodes the principle of stare decisis and undermines the stability that is the hallmark of our common law system.