



Supreme Court Upholds Claim of Cancer Caused By Workplace Exposure

The West Virginia Supreme Court of Appeals last month upheld an order by the state's workers' compensation board finding a **Severstal** steel worker's claim for bladder cancer compensable as an occupational disease.

Ernest Gambellin filed an injury report alleging bladder cancer as an occupational disease on April 25, 2008. His employer denied the claim for a "lack of causal relationship" between the alleged disease and Gambellin's employment.

His pro bono attorney, **Zak Zatezalo of Bordas & Bordas**, appealed the ruling to the **Office of Judges**. Zatezalo said the Office of Judges reversed the claims administrator's denial and held Gambellin's claim compensable for bladder cancer as an occupational disease, finding that Gambellin was subjected to dermal and inhalation exposure of coal tar pitch and coal tar in his job, and that certain safety measures were at many times not working.

The company appealed the Office of Judges ruling to the **Workers' Compensation Board of Review**, where the Office of Judges decision was upheld. Following that ruling, Gambellin's employer again appealed to the state Supreme Court.

In upholding the Board of Review decision, the Supreme Court noted an **OSHA** report that confirmed Gambellin's testimony that the gas blanketing system was often inoperable and that maintenance and repairs at the plant lacked in several areas.

The court also noted that the Office of Judges found that a toxicologist acknowledged that exposure to coke oven emissions, such as coal tar pitch, crude coal tar and coke oven gas, has been associated with bladder cancer.

In a news release, Zatezalo said, "Ernie's case highlights the fact that the daily realities of life in a plant are often times much different than the way things are 'supposed to work.' In denying and appealing Ernie's claim, **Severstal Wheeling Inc.** (formerly **Wheeling-Pittsburgh Steel Corp.**) argued the theoretical manner in which Ernie's workplace was supposed to operate to minimize workplace exposure to harmful toxins. But evidence from **OSHA**, Ernie and other witnesses proved the realities of the unavoidable exposure to harmful toxins that workers like Ernie often face on a constant basis from equipment breakdowns, pressure to produce and the very nature of the chemical manufacturing process itself."

Judicial Issues Central at Supreme Court Forum

By **WHITNEY BURDETTE**
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Two Democrats and two Republicans are vying for two empty seats on the **West Virginia Supreme Court of Appeals**, but three of those candidates said they would favor the non-partisan election of judges.

Speaking at a candidates' forum Oct. 2 sponsored by the **South Charleston Chamber of Commerce**, Democrat **Tish Chafin** and Republicans **John Yoder** and **Allen Loughry** told audience members politics would not play into decisions they would make as Supreme Court justices.

Loughry said the non-partisan election of judges is "absolutely appropriate" and pointed out West Virginia is one of six states that elects its judges.

"I think that it's absolutely, entirely appropriate for you to expect political responses from your governors and from your legislators," Loughry said. "You want those people to argue for you philosophically based upon your feelings on health, safety, welfare, morals, whatever. That's entirely appropriate. You should feel like you're electing or selecting judges, not that you're electing politicians at the end of the day. The judiciary should be the non-political branch of government."

Chafin, who has practiced law for several years and once served as president of the **West Virginia Bar Association**, said when she enters a courtroom to argue a case, she doesn't think about the judge's politics.

"I know when I walk into a courtroom, whether it's magistrate court, family law court, circuit court or even the West Virginia Supreme Court, the last thing on my mind is 'Geez, I wonder if that judge is a Republi-

can or Democrat,'" Chafin said. "What you have on your mind is what is the case law that applies to the facts of my client's case, and how do I present that and get a fair ruling for my client? You don't care about Democrat or Republican. I do think, in the courtroom, there are no politics. There are no Democrats or Republicans."

Yoder said most judges don't like the idea of non-partisan election of judges, but he thinks justices should be chosen on merit, not based on politics or money.

West Virginia is often named by certain groups as a judicial hellhole, and candidates from both parties said improving the state's business climate is one way to restore confidence. Loughry, who wrote a book on political corruption in West Virginia — "Don't Buy Another Vote, I Won't Pay For a Landslide" — said people see the entire West Virginia political system as corrupt.

"The business court is a good step forward. I applaud the court for stepping up," Loughry said. "This is something the business community wanted. This is not just about perception. If it were one more layer of government purely about perception, this is not something I would be in favor of. But what this is, is a specialized court and it's nothing new to West Virginia. We have family courts, we have drug courts, and it's similar to that. It allows for more stability in the system and allows for the business community to expect they can get something resolved fairly promptly, often times within 10 months rather than litigation going on for years and years and years."

Recusal reform has been another point of discussion during the race. The court has come

under fire in recent years because of a justice's refusal to recuse himself from a case involving a campaign donor. Chafin said as state bar president she traveled to conferences across the country and the issue was a hot topic of discussion. She called it a "black eye" for West Virginia.

"It is a current topic. There are articles written about it

as recent as this spring, so it is relevant," Chafin said. "Does it happen all the time? No. But it takes one case, like **Caperton v. Massey** to give West Virginia a black eye."

Chafin's balanced court initiative calls for more rigorous recusal rules for the court.

"The ship has sailed for us to lead the way," she said. "Now we need to catch up."

Yet another issue in the race is the development of an intermediate appellate court. Loughry, who is currently employed by the West Virginia Supreme Court, said he's proud of the revisions to the court over time, and he favors an intermediate court. Chafin pointed out that any decisions to change the make up of the court would be made by the **Legislature** and appellate procedure rules have been in place for two years — long enough for the Legislature to see how they're working.

"From my perspective, I think every case that comes before the Supreme Court should be fully and fairly reviewed," Chafin said.



However, Yoder said while he favors an intermediate court, it has to be set up correctly so as not to duplicate the Supreme Court.

"I think it has to be set up in the right way, or it will be a waste of time," Yoder said. "If we set up an intermediate court of appeals that is just like the state Supreme Court, in other words, justices are chosen statewide in a political election, it becomes another layer of bureaucracy that everyone has to go through, and we don't get a final opinion until it gets to the West Virginia Supreme Court."

Yoder said he'd like to see instead an intermediate court with three separate divisions, one in each congressional district, with judges elected from within that district. That would make the judges closer to the people and create geographical diversity in the way they decide the cases.

"If you're just going to duplicate the state Supreme Court and set it up the same way, how is it going to differ?" Yoder said. "It's going to be the same, so I think we need to be cautious about it."

Justice **Robin Davis**, a Democrat, was out of town and unable to attend the forum.

W.Va. Court Ruling Clarifies Tax Exemptions For Businesses

By **BETH GORCZYCA RYAN**
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A recent **West Virginia Supreme Court of Appeals** decision has added a bit of clarity to laws regarding a tax exemption many warehousing businesses use in the state.

The court on Sept. 25 ruled that the Brooke County assessor and the local circuit court erred when they ruled that **Feroletto Steel Co. Inc.** was not entitled to a tax exemption for its warehouse inventory under the 1986 Freeport Amendment to the state constitution.

Feroletto, which is headquartered in Kentucky, has a warehouse in Weirton where it receives, stores and cuts to size large steel coils. The cut steel is then shipped to its five customers, all of which are out of state. Ferroletto had been granted the Freeport exemption for more than a decade, but in 2010, when Ferroletto applied for the exemption again, the company was denied.

According to lawyers with **Spilman, Thomas and Battle**, which represented Ferroletto in its Supreme Court appeal, the county assessor and state tax commissioner state that since Ferroletto was cutting steel, it was creating a new product, which made the tax exemption void. The company petitioned the **Brooke County Circuit Court**, and Judge **Arthur Recht** found in favor of the assessor and tax commissioner.

The company appealed to the Supreme Court, which heard oral arguments last month.

In a 5-0 decision, justices ruled the exemption did apply to the company and the county and state Tax Department were erroneous in their interpretation of the amendment.

Spilman lawyers said the Supreme Court's clear decision accomplished two things. First, it enabled Ferroletto to keep its Weirton warehouse open, something the company said it might

not be able to do if it suddenly had to pay taxes on the steel stored there. Second, it clarified the amendment for assessors throughout the state.

"There had been a number of decisions by tax commission and orders from circuit court regarding this. But no one had ever taken one of those decisions to the Supreme Court about what businesses get the exemption," said **Michael G. Gallaway**, a lawyer in Spilman's Wheeling office who argued the case in the Supreme Court.

David Croft, another Spilman lawyer, said the high court's decision "creates some consistency" for businesses, something that he said there is "a thirst for" in the state.

He said had the court ruled the other way or not considered the case at all, the inconsistency among counties' interpretations of what types of businesses are eligible would have continued, causing some businesses to

leave the state and other businesses to never locate here.

"The clear provisions in the Freeport amendment is that while materials are in a warehouse you can cut it and do a host of things and not lose exemption," Gallaway added. "Businesses that were here relied on that language. Then suddenly changing that really impacts business. ... It gives clarity to assessors, judges and businesses who do this type of work some clarity about what they can or can't do to keep incentive."

Don Rigby, executive director of the **Regional Economic Partnership** in Wheeling, said other businesses in the Northern Panhandle also risked losing their Freeport exemption under the assessor's reading of the amendment. He said those businesses were closely watching the Supreme Court on this case.

"We know of one company for sure, but several others may have been also," he said.