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Kroger Co. v. Morris: The Diminution of Hearing Officers

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KROGER CO. v. MORRIS: THE DIMINUTION OF HEARING OFFICERS

I. INTRODUCTION

In *Kroger Co. v. Morris*[1] the Court of Appeals of Virginia reached two contradictory conclusions. On one hand the court held that the Virginia Workers' Compensation Commission could overrule a deputy commissioner's fact findings based solely on evidence contained in the record below.[2] On the other hand, the court concluded that it was *itself* unable to make such fact findings based solely on the record.[3]

In *Kroger*, the deputy commissioner ruled that inconsistencies in Morris' several accounts of his injuries made his case incredible.[4] The full Commission, on review of the record, but without calling witnesses,[5] found that the substance of Morris' accounts was credible and overruled the deputy commissioner.[6] On appeal Kroger argued that the full Commission's reversal of the deputy commissioner was arbitrary, and therefore, reversible error.[7] The court of appeals disagreed and affirmed the decision of the Commission.[8]

This note will address two questions that stem from these facts. First, what deference does the full Commission owe to the fact findings of a deputy commissioner? Second, what deference does the court of appeals owe the full Commission's fact findings when those findings are based solely on a record compiled by a deputy commissioner? Finally, the note asserts that the full Commission should give substantially more deference to its deputies than it presently demonstrates and that on judicial review

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1. 14 Va. App. 233, 415 S.E.2d 879 (1992). According to the Office of the Clerk of the Court of Appeals of Virginia, no appeal to this decision had been noted. The time period in which to note an appeal expired on April 30, 1992. VA. SUP. CT. R. 5:14.

2. *Kroger*, 14 Va. App. at 236, 415 S.E.2d at 881.

3. *Id.* at 236-37, 415 S.E.2d at 881.

4. *Id.* at 236, 415 S.E.2d at 881.

5. The full Commission may, in its discretion, review a case de novo. VA. CODE ANN. § 65.2-705(A) (Repl. Vol. 1991).

6. *Kroger*, 14 Va. App. at 236-37, 415 S.E.2d at 880-81.

7. *Id.* Note that there is some confusion here as to what exactly the full Commission said regarding Morris' credibility. Kroger Company argued that the full Commission made no finding regarding Morris' credibility, and in fact relied upon that assertion in part to bolster its claim that the full Commission acted arbitrarily. The court of appeals made no reference to any specific finding by the full Commission, but noted summarily that "the full commission could make its own credibility determination. Its finding is supported by the evidence." *Id.* (citation omitted). This note assumes that the full Commission, explicitly or implicitly, made a finding about a witness' credibility, contrary to that of the deputy commissioner.

8. *Id.*

the court of appeals should have broader latitude to weigh the contents of the record against the full Commission's findings.

II. What Law Applies

As a threshold matter, one should note that the workers' compensation statute governs hearings before the Commission.[9] The statute provides that the Commission, or any of its members or deputies, shall hear workers' compensation matters.[10] If the hearing is not initially presented before the full Commission, the full Commission shall, on petition, review the case.[11] Section 65.2-706 of the Code of Virginia provides in relevant part that "[t]he award of the [Workers' Compensation] Commission . . . shall be conclusive and binding *as to all questions of fact*. . . ."[12] Appeals shall lie from such award to the Court of Appeals [sic] in the manner provided in the Rules of the Supreme Court."[13] Rule 5A:11 of the Supreme Court of Virginia provides that decisions of the full Commission may be appealed to the court of appeals as a matter of right.[14]

III. Virginia Law Prior to *Kroger*

In general, the fact findings of a deputy commissioner are not binding on the full Commission.[15] A limited exception, however, is made for deputy commissioners' findings regarding witness credibility.[16] Even when a deputy commissioner makes a finding regarding witness credibility, the full Commission is not necessarily bound. Rather, to the extent that the deputy commissioner makes a specific, recorded finding of a witness' demeanor or appearance, and predicates some portion of her decision on that finding, the full Commission "may not *arbitrarily* disregard" that finding.[17] If the finding of credibility, or lack thereof, is predicated on the substance of the witness' testimony and not the witness' demeanor, the full Commission may make a credibility determination as readily as the deputy.[18]

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9. The Virginia Administrative Procedure Act expressly exempts workers' compensation award hearings from its purview. Va. Code Ann. § 9-6.14:4.1(D)(2) (Cum. Supp. 1992).

10. Va. Code Ann. § 65.2-704 (Repl. Vol. 1991).

11. *Id.* § 65.2-705 (Repl. Vol. 1991).

12. *Id.* § 65.2-706 (Repl. Vol. 1991).

13. *Id.* § 65.2-706(A) (Repl. Vol. 1991) (emphasis added).

14. Va. Sup. Ct. R. 5A:11.

15. Williams v. Auto Brokers, 6 Va. App. 570, 573, 370 S.E.2d 321, 323 (1988).

16. Goodyear Tire & Rubber Co. v. Pierce, 5 Va. App. 374, 382, 363 S.E.2d 433, 437 (1987).

17. *Id.* at 382, 363 S.E.2d at 437 (emphasis added); *see also Williams*, 6 Va. App. 570, 370 S.E.2d 321 (1988)(holding that full Commission can reverse even demeanor-based fact findings of a Deputy so long as it makes reference to credible evidence in the record).

18. *Pierce*, 5 Va. App. at 382, 363 S.E.2d at 437.

The court of appeals owes far greater deference to the fact findings of the full Commission. Although Code of Virginia section 65.2-706 provides that the fact findings of the full Commission are "conclusive and binding" on appeal,[19] that rule alone conveys little in terms of what standard for determining error is to be applied. Over time the courts have discerned a standard of review. As long as the full Commission's findings are based upon "credible evidence," they will not be overturned.[20] Courts have further construed the standard to mean that "[i]f there is evidence, or reasonable inferences can be drawn from the evidence, to support the Commission's findings, they will not be disturbed on review, *even though there is evidence in the record to support a contrary finding.*"[21]

Although the court in *Kroger* did not posit why the judiciary should be so deferential to the full Commission, case law and intuition provide some rationale. First is the clear expression of the legislature's intent in Code of Virginia section 65.2-704.[22] As noted above, however, a blanket assertion that fact findings are "binding and conclusive" hardly announces a standard of review.[23]

Courts also frequently defer to administrative fact findings on the grounds that administrative agencies have a special expertise courts do not share. "An administrative agency is expected 'to apply expert discretion to the matters coming within its cognizance.' "[24] In *Metropolitan Cleaning Corporation v. Crawley*,[25] the Court of Appeals of Virginia argued that deference to the Virginia Workers' Compensation Commission as a fact finder is appropriate because the Commission " 'acquires an expertise and accumulates an experience in [its] limited, specialized field often more extensive than that of the judiciary.' "[26]

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19. VA. CODE ANN. § 65.2-706(A) (Repl. Vol. 1991).

20. Clinchfield Coal Co. v. Bowman, 229 Va. 249, 251, 329 S.E.2d 15, 16 (1985); Caskey v. Dan River Mills, Inc. 225 Va. 405, 411, 302 S.E.2d 507, 510 (1983); Fairfax Hosp. v. DeLaFleur, 221 Va. 406, 410, 270 S.E.2d 720, 722 (1980); Island Creek Coal Co. v. Breeding, 6 Va. App. 1, 12, 365 S.E.2d 782, 788 (1988).

21. Morris v. Badger Powhatan/Figgie Int'l, Inc., 3 Va. App. 276, 279, 348 S.E.2d 876, 877 (1986) (citing *Caskey*, 225 Va. at 411, 302 S.E.2d at 510-11 (1983)) (emphasis added).

22. VA. CODE ANN. § 65.2-704 (Repl. Vol. 1991).

23. Although the statute's plain language does not indicate a precise standard of review, "binding and conclusive" probably does preclude a *de novo* trial on appeal. *See* Brown v. Fox, 189 Va. 509, 516, 54 S.E.2d 109, 113 (1949)(holding that findings of fact, if supported by credible evidence, are binding on appeal); 1A MICHIE'S JURISPRUDENCE *Administrative Law* § 18 (1990).

24. Metropolitan Cleaning Corp. v. Crawley, 14 Va. App. 261, 265, 416 S.E.2d 35, 38 (1992)(citing Virginia ABC Comm'n v. York St. Inn, Inc., 220 Va. 310, 315, 257 S.E.2d 851, 855 (1979) (quoting Schmidt v. Board of Adjustment, 88 A.2d 607, 615-16 (N.J. 1952)).

25. 14 Va. App. 261, 416 S.E.2d 35 (1992).

26. *Id.* at 38 (quoting Dunton v. Eastern Fine Paper Co., 423 A.2d 512, 514 (Me. 1980). In support of this general proposition that courts ought to defer to agencies because of the latter's special expertise, the Virginia Court of Appeals in *Crawley* cited the following none of which are Virginia cases: Brown v. Workmen's Compensation Appeal Bd. (Transworld

The court in *Goodyear Tire & Rubber Co. v. Pierce*[27] held that the relationship between a deputy commissioner and the Commission was analogous to that between a commissioner in chancery and a chancellor to the extent that the fact findings of the former are due some deference by the latter. "Even where the commissioner's findings of fact have been disapproved, an appellate court must give due regard to the commissioner's ability, not shared by the chancellor, to see, hear, and evaluate the witnesses at first hand."[28] Significantly, however, the *Goodyear* court adopted that rationale not for the proposition that in certain cases appellate courts should defer to the full Commission, but for the proposition that in some instances, such as when witness demeanor is at issue, the full Commission should defer to a *deputy commissioner*.[29]

Finally, common sense argues that in the interests of judicial economy, appellate courts ought to leave fact finding to lower courts. Where an administrative agency decision is appealed the logic is the same; appellate courts are simply ill-equipped to try cases de novo and the judiciary in general is ill-equipped to try cases more than once.[30]

The *Kroger* court articulated none of these rationales supporting judicial deference to the fact findings of the Commission. The court in *Kroger* cited the *de rigueur* language about credible evidence supporting the findings of the Commission and almost conclusively recited some of the evidence that tended to substantiate Morris' claim that he was a credible witness. At no point did the court of appeals weigh the evidence in favor of Morris against the evidence in favor of Kroger, nor did the court of appeals ever assay the deputy's report as evidence at all.

The court declined to discuss the weight of the deputy's report because the report's weight was limited to any finding the report may have made

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Airlines), 476 A.2d 900, 902 (Pa. 1984); Szumski v. Dale Boat Yards, Inc., 226 A.2d 11, 16, *cert. denied*, 387 U.S. 944 (N.J. 1967); Tallman v. Arkansas Best Freight, 767 P.2d 363, 369 (N.M.Ct. App. 1988); Wright's Furniture Mill, Inc. v. Industrial Comm'n of Utah, 707 P.2d 113, 114 (Utah 1985); *Metropolitan Cleaning Corp.*, 14 Va. App. at 266, 416 S.E.2d at 38. However, in Roanoke Water Works Co. v. Commonwealth, 137 Va. 348, 119 S.E. 268 (1923), the Virginia Supreme Court held that deference to the State Corporation Commission was appropriate because of a constitutional mandate to defer and because of the SCC's experience in dealing with matters within its jurisdiction. *Id.*

27. 5 Va. App. 374, 363 S.E.2d 433 (1987).

28. *Id.* at 382, 363 S.E.2d at 437 (1987)(quoting Hill v. Hill, 227 Va. 569, 577, 318 S.E.2d 292, 297 (1984)).

29. Note, however, that the full Commission in *Kroger* did not have the benefit of hearing testimony, yet it reversed the deputy.

30. Although in certain instances, such as habeas corpus, facts and issues may be functionally "re-tried" as a general proposition, litigants are entitled to but one opportunity to prove facts. See Keeney v. Tamago-Reyes, 112 S. Ct. 1715 (1992) (allowing litigation of federal constitutional claims in federal court after a state criminal conviction only if the habeas corpus petitioner can show "cause and prejudice").

with respect to a witness's demeanor or appearance.[31] Having concluded that the deputy made no credibility findings based on appearance and demeanor, the court effectively concluded that the deputy's report was irrelevant to the question on appeal regarding sufficiency of the evidence.[32]

IV. Comparing Virginia Law to Federal Law

In *Universal Camera Corp. v. NLRB*[33] the United States Supreme Court, interpreting the Taft-Hartley Act and the Federal Administrative Procedure Act (APA), held that an NLRB examiner's report is as much a part of the record as the Board's report and must therefore be considered when examining an NLRB decision for substantiality.[34]

The federal approach differs in two significant respects from Virginia's approach insofar as judicial deference to administrative fact finding is concerned. First, the federal approach is less tolerant of an agency's cavalier attitude regarding a hearing officer's findings. Regardless of whether the hearing officer has predicated his findings on a witness's demeanor, the agency is not free to disregard the hearing officer's conclusions.[35] *Universal Camera* quoted with approval, although it did not make mandatory, the following language from the Attorney General's Committee on Administrative Procedure: "In general the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court."[36] The Court in *Universal Camera* cautioned, however, that such a rationale did not re-

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31. Kroger Co. v. Morris, 14 Va. App. 233, 236, 415 S.E.2d 879, 881 (1992). *See* discussion of weight of deputy's findings, *supra* notes 7-8 and accompanying text.

32. *Kroger*, 14 Va. App. at 236, 415 S.E.2d at 881.

33. 340 U.S. 474 (1951). This case also decided that agency findings would be upheld if based upon "substantial evidence" and that in examining a decision for substantiality, reviewing courts would not view the evidence isolated from the record, but rather would weigh the evidence against the "whole record." *Id.* at 487 (relying on the "mood" expressed by Congress.) An NLRB hearing examiner is analogous to a deputy commissioner and the NLRB to the full worker's compensation commission. *See* Recent Decisions, *Administrative Law*, 37 Va. L. Rev. 871, 873 (1951).

34. *Universal Camera*, 340 U.S. at 493.

35. *Universal Camera*, 340 U.S. at 496 ("We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses *and lived with the case* has drawn conclusions different from the Board's than when has reached the same conclusion." (emphasis added)) *See Supreme Court, 1950 Term* 65 Harv. L. Rev. 107, 163 (1951)(arguing that the "courts will be more ready than before to reverse the agencies" and that courts' beliefs regarding agency bias will have an "unarticulated influence on the judicial readiness to accept the administrative findings.").

36. *Universal Camera*, 494 U.S. at 492 (quoting the United States Attorney General's Committee on Administrative Procedure, Final Report at 51).

> Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the

quire the examiner's findings to be given "more weight than in reason and in the light of judicial experience they deserve."[37]

Second, the federal approach anticipates that an appellate court, as well as the agency, will automatically consider the effect of the examiner's report, regardless of the outcome of the case. In applying the substantial evidence test on the basis of the whole record, the federal APA requires that the agency's findings be weighed against evidence in opposition to the agency's conclusions.[38] In *Kroger v. Morris*, as noted above, the court of appeals considered only that evidence which operated to support the full Commission in its review of whether "credible evidence" supported the full Commission's findings.[39]

V. Which Law Makes Better Sense?

Virginia practice differs from federal practice because of the different jurisdictions' approaches to judicial review. Whereas federal courts will review the entire record of the agency adjudication in order to determine whether substantial evidence exists to support the agency finding, Virginia courts look only to see if "credible evidence" supports an agency finding.[40]

That difference in approach explains the narrower grounds upon which Virginia courts will review agency findings, and insofar as *Kroger v. Morris* is concerned, the limited deference reviewing courts give to deputy commissioners. If the Virginia courts intend to adopt a policy of giving

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> evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.

Id.

The quote from *Universal Camera* might be explained by an analogy to mathematics. If one allocates units of measure to bits of evidence, one might compare the weight of the evidence as a proportion. One unit out of four might be considered substantial, if one assumes that the four units are comprised of bits of evidence that do not include the hearing officer's findings. However, if one added the hearing officer's findings, and they added four more units, one unit out of eight might not be considered substantial. The difficult part is of course assigning units to bits of evidence; therein lies the weighing process.

37. *Id.* at 496. The Court went on to say:

> The significance of his [the hearing examiner's] report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is 'substantial.'

Id. at 496-97.

38. *Id.* at 417-78.

39. The court did not compare the deputy's findings with the Commission's findings, but observed only that the Commission's findings were sufficient in and of themselves to merit affirmance. Kroger Co. v. Morris, 14 Va. App. 233, 236-37, 415 S.E.2d 879, 881 (1992).

40. Morris v. Badger Powhatan/Figgie Int'l, Inc., 3 Va. App. 276, 279, 348 S.E.2d 876, 877 (1986).

credence to agency decisions, one can scarcely complain that intermediate, or subordinate branches of an agency are given little deference.

On the other hand, to the extent that litigants view deputy commissioners as institutional manifestations of a fair hearing, the extent to which deputies are easily overruled diminishes the litigants' fair hearing.[41] Consider the reasons that might justify this lower degree of deference to a deputy.

Although the Workers' Compensation Commission may have a measure of expertise with respect to those sorts of cases, that reason provides little support for the proposition that the court of appeals should not give credence to the deputy commissioner. First, the deputy commissioner may have as much expertise as the full Commission, and therefore additional deference to the full Commission might be unwarranted. More importantly, however, the issue in *Kroger*, whether to believe the plaintiff or not, required no particular expertise. The full Commission simply reviewed the plausibility of the plaintiff's sometimes conflicting accounts of his injury.[42] Finally, because appeals from the full Commission are taken to the court of appeals as a matter of right, one might fairly speculate that the judges of the court of appeals may have also cultivated some expertise in the field.[43]

The facts in *Kroger* are ill-suited to the argument that the court of appeals should defer to the full Commission because the trier of fact had the better opportunity to see and understand the case first hand. As noted above, the full Commission reversed the deputy without calling a single witness, and solely on the basis of the printed record. In the absence of a specific, recorded observation about the witness' demeanor by the deputy commissioner, the court of appeals concluded that the hearing officer's findings were essentially irrelevant to the question of whether the evidence was sufficient to sustain the full Commission's findings.[44]

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41. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Hewitt v. Helms, 459 U.S. 460 (1983); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). These cases discuss the due process implications of administrative hearings and establish the well-settled proposition that due process considerations attach to administrative hearings. Note, however, that these cases recognize the equally well-settled proposition that not all liberty and property interests merit the same procedural safeguards.

42. "Deputy Commissioner Costa's determination of Morris' credibility was based on the evidence and the substance of Morris' testimony, rather than on Morris' appearance or demeanor." Therefore, the full Commission could make its own credibility determination. Kroger Co. v. Morris, 14 Va. App. 233, 236, 415 S.E.2d 879, 881 (1992) (citation omitted).

43. According to the Clerk of the Virginia Court of Appeals, of the 2611 cases filed with that court in 1992, 340 were Workers' Compensation cases. Telephone Interview with Patricia Davis, Clerk of the Virginia Court of Appeals (February 3, 1993). Thus, approximately thirteen percent of the Court's caseload consists of Workers' Compensation cases.

44. *Kroger*, 14 Va. App. at 236, 415 S.E.2d at 881.

Even in the event that the deputy commissioner makes no observation about a particular witness' credibility, one strains credulity to argue that appearance, demeanor, and the overall nature of the hearing did not convey some sense of right or wrong to the hearing officer, and did not in some way affect his decision. If one concludes as the court of appeals did, the necessary result is that actually being at the hearing meant nothing; that essentially the parties could have mailed their testimony in to the deputy. Such a conclusion presumes too much.[45]

The sum of this analysis is to suggest that the Virginia approach of giving weight to the findings of deputy commissioners is ill-advised. To the extent that this approach is a result of Virginia's inclination to give only limited judicial review to the adjudications of the Workers' Compensation Commission, that inclination is also ill-advised.

Parties are entitled to expect that their formal hearing is not for appearances alone. The full Commission ought not be able to disregard the result of what amounts to a trial, solely on the basis of finding some credible evidence with which to support a reversal. More significantly, the court of appeals should not find itself constrained to hamstring itself in order to give effect to fact findings that might have some credible support, but in light of the whole record, are insubstantial.[46]

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45. Recall the observation made in *Universal Camera* that hearing officers who have *lived* with a case bring a certain weight to their findings. Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951).

46. Note that this theoretical result is not necessarily the one that follows in practice. Arguably, if a judge believes that a significant injustice is being done as a result of a full Commission finding, regardless of the standard, that judge will simply define the standard by the offensive conduct. For a discussion of this sort of analysis, see Charles M. Harrison, *The West Virginia Administrative Procedure Act*, 66 W. VA. L. REV. 159, 189 (1964).

One should be careful not to overstate the limitations on the court of appeals. As discussed above, the court has an obligation to reverse where no credible evidence exists, and need not affirm as true facts which it knows to be false. Board of Supervisors v. Lucas, 142 Va. 84, 94, 128 S.E. 574, 577 (1925).