

## STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24<sup>th</sup> day of January 2008, the following order was made and entered:

Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, Sovereign Coal Sales, Inc., Plaintiffs Below, Appellees

vs.) No. 33350

A.T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc., Defendants Below, Appellants

The Court, having maturely considered the petitions for rehearing filed by the appellees, Harmon Development Corporation, Harman Mining Corporation and Sovereign Coal Sales, Inc, and Hugh M. Caperton, by their attorneys, on the 20<sup>th</sup> day of December, 2007, doth hereby grant said petitions for rehearing.

It is hereby ordered that the above-captioned proceeding be reargued and is hereby placed on the Court's Argument Docket scheduled for Wednesday the 12<sup>th</sup> day of March, 2008. It is further ordered that the appellants and appellees file an original and nine copies of supplemental briefs within twenty days of receipt of this order; the appellants and appellees to file a like number of supplemental responses within ten days of their receipt of the supplemental briefs. It is further ordered that such supplemental briefs and responses are limited to 50 pages, pursuant to Rule 10(d) of the Rules of Appellate Procedure, and no motions to exceed such limit will be considered by the Court.

Justice Maynard deeming himself disqualified did not participate in this decision.  
Judge Cookman sitting by special assignment.

Justice Davis would vote to grant the petition for rehearing based upon Chief Justice Maynard's recusal of himself from this case; the appointment of the Honorable Donald H. Cookman to sit by temporary assignment in this case; and the decision of the United States Supreme Court in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 827-28, 106 S. Ct. 1580, 1588, 89 L. Ed. 2d 823 (1986) ("[W]e are aware of no case . . . permitting a court's decision to stand when a disqualified judge casts the deciding vote.").

Justice Starcher states: I voted to rehear this case because I believe the earlier majority opinion was in error, for the reasons stated in my dissent and Justice Albright's dissent. The appellees deserve the right to bring those errors to the attention of the Court.

However, I would have strongly preferred not to vote on the rehearing until we had discussed the matter further. If we had taken time, and not decided the rehearing issue on this day, there would be absolutely no injury to any party. This case has been pending for several years, and a few more days or weeks will do no harm.

If we had taken time, matters relating to Court's prior decision in this case could be properly considered, including the effect of Justice Maynard's recent recusal. If it was right for Justice Maynard to have recused himself and not voted in this case - after the pictures filed in a recent motion were publicly revealed and he acknowledged contacts with a litigant's CEO while this case was pending - should his prior vote, while the pictures and contacts were a secret, have any effect at all? This issue remains unresolved.

Moreover, taking time might have helped resolve other matters. My participation in deciding this case has been challenged on the grounds that I have spoken clearly and distinctly about my dislike for the way individual money was spent in the last Supreme Court election by that same CEO. I have an absolute right and duty to comment publicly on that issue, although my language should have been more temperate, I admit. But I can separate that opinion from my understanding of the law.

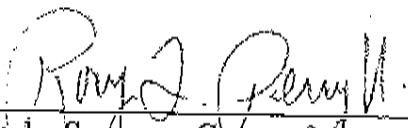
Furthermore, Justice Benjamin, who benefitted from expenditures of huge amounts of money provided by that same CEO has also been criticized for sitting on this case; and he, I am sure, also sincerely believes he can separate that fact from his understanding of the applicable law. (I stepped aside in 1996 in an asbestos case because of \$36,500 in campaign contributions from lawyers, even though their contributions had no effect on my rulings.)

Nevertheless, I would have preferred that we both take time to consider whether it would be better to step aside. But taking time for that possibility was rejected by the majority.

In the absence of any possibility to postpone a vote and have more reflection on these matters, I have voted to rehear the case.

A True Copy

Attest:

  
Clerk, Supreme Court of Appeals