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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Justice, concurring:

In enacting the Workers' Compensation Code, at *W.Va. Code* § 23-1-1, *et seq.*, the West Virginia Legislature set forth a comprehensive system of proof and recovery for work-related injuries and diseases outside the traditional common law system. Because of its statutory basis and the strong policy and political issues present within the system, this Court's duty must be to give effect to the express intentions of the Legislature, so long as legally permissible. As a Court, we must respect our fellow branch of government and resist the temptation to legislate policy changes from the bench.

Here, the majority opinion properly applies the *Legislature's* intention of what permanent total disability benefits are in its consideration of whether such benefits are marital or separate property. I disagree with my dissenting colleagues and decline their invitation to judicially remold permanent total disability benefits into something the Legislature does not now intend them to be. To do otherwise would not only contravene our necessary duty of restraint herein, but also plunge this Court into the speculative endeavor of determining on appellate review which portion of such benefits represents wage replacement and which portion does not.

No consideration of the nature of permanent total disability benefits can ignore the deliberate and very specific statutory changes made by the Legislature in the last decade regarding such benefits. It is here where the arguments advanced by the dissenting opinion fail. As correctly stated in the majority opinion, it is the Legislature which has caused permanent total disability benefits to be considered wage replacement. See, in part, *W.Va. Code* §§ 23-4-23(b) (2003), 23-4-24 (2005) and 23-4-25(b) (2005). Thus, such benefits cease at the time when retirement is presumed to occur and when retirement-type benefits normally begin. See, *W.Va. Code* § 23-4-6(d) (2005). It is not our role to second-guess the Legislature in this regard.

While I understand many of the concerns of my dissenting colleagues with respect to the pain and suffering component of work-related injuries, I note that the provisions of the workers compensation code distinguish between permanent total and permanent partial disability benefits. While the Legislature has acted definitively to categorize permanent total benefits as wage replacement benefits, I am not convinced that such an argument applies for permanent partial benefits. Though permanent partial benefits are derived by a calculation involving wage considerations, such benefits are often paid to injured workers after they have already returned to work and are otherwise earning their normal wages or salary. Indeed, such benefits are often referred to by claimants as “settlements.” Though that term is not technically correct from a legal standpoint, it does describe how such permanent partial benefits are viewed from a lay standpoint.

Because of their nature, and because of the preference under the law of this State for classification of marital property, the majority opinion properly holds that workers' compensation permanent total benefits which are marital property are properly subject to equitable distribution pursuant to *W.Va. Code* § 48-7-101, *et seq.* See, also, *Staton v. Staton*, 218 W.Va. 201, 624 S.E.2d 548 (2005). In so doing, the majority opinion properly gives effect to the intent of the Legislature. Accordingly, I concur with the majority opinion.