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Will Benjamin be a reliable pro-business vote on court?

Some fear he will defer to his election backers

By Toby Coleman

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This week, the justices of the West Virginia Supreme Court return to the bench to begin answering questions about gay rights, medical malpractice lawsuits and annoying neighbors.

As they work, they also will search for a new balance of power within the court.

The reason: Justice Brent Benjamin, who comes to the bench after defeating Justice Warren McGraw in November.

Benjamin is now the swing vote in a five-person court divided over questions about the rights of employees, the duties of insurance companies and the administration of workers' compensation. How he votes will be important because the court's answers to these questions will affect voters' bank accounts and businesses' bottom lines.

Plaintiff's lawyers and unions worry that Benjamin will lean toward businesses because he won the seat on the crest of a multimillion-dollar campaign financed by doctors, businesses and Massey Energy Co. Chief Executive Officer Don Blankenship.

"I know there are those on the defense side who are very pleased and those on the plaintiffs' side who are very disappointed," said Deborah McHenry, a former Supreme Court clerk.

But in public, most lawyers, including McHenry, say it is too early to mark Benjamin down as a justice who reads the law like the business community.

"The notion that Benjamin will be more likely than not to vote in a certain fashion is not shared by the people who know him and who have worked with him," said Mark Carter, a Charleston lawyer who helps the state Chamber of Commerce review high-court decisions.

“This is a guy who will look at the law and will look at the facts and pay tremendous attention to precedent,” Carter said. “I don’t think his vote will be entirely predictable.”

Even Benjamin says that he does not know how he will vote “on a lot of these cases.”

“My basic tenet is, it is a justice’s job to apply the law,” he said in an interview last week. “It’s wrong for justices to try to make the law or to prejudge cases to reach predetermined results.”

Benjamin is stepping on to a high court that is deeply divided on certain issues that touch people’s pocketbooks.

In recent years, for instance, a 3-2 court has said that state law requires liberal interpretations of insurance coverage and literal readings of laws and contracts that limit an employer’s ability to fire a worker.

The differences between Justices McGraw, Joe Albright and Larry Starcher and Justices Robin Davis and Spike Maynard became evident in 2003.

In June of that year, Albright, McGraw and Starcher told self-insured employers to help pay off the state’s multibillion-dollar workers’ compensation debt.

Maynard responded with a vigorous dissent. In it, he blamed his colleagues for West Virginia’s stagnant economy.

“Sadly, what is ultimately destroyed by decisions such as this is future economic development and the possibility of attracting new businesses and new jobs to West Virginia,” he wrote.

Maynard’s opinion resonated with the court’s critics.

Last year, special-interest groups created to help the state’s economy by restoring “fairness” to the high court spent more than \$3.5 million trying to boot McGraw off the court. Doctors and businesses contributed hundreds of thousands of dollars to the effort. Massey Energy’s Blankenship gave at least \$2.5 million.

Last week, Starcher marked Benjamin's arrival by putting an editorial cartoon outside his office door.

It depicted Benjamin showing up at the high court in a shipping crate marked "courtesy of \$3.5 million from Massey Coal and other coal interests."

Benjamin never saw the cartoon, but Starcher got his point across. People are watching Benjamin closely to see if he will give special favors to Massey and his other business backers.

"Any concern I have has to do with those who brought him into office," said Steve White, director of the Affiliated Construction Trades Foundation. "People don't spend \$5 million or \$10 million for nothing, and they don't do it for altruistic reasons."

The worries ran so deep that some people have called on Benjamin to promise not to hear any cases involving Massey. Benjamin refused and said he would decide whether to recuse himself from Massey lawsuits on a case-by-case basis.

"I think it's unfortunate that our system has caused people to be so jaded as to believe that justices approach cases in a biased manner, and I think that's certainly something I'm looking forward to trying to change," Benjamin said.

"I think we need to move away from this cynical view that judges practice favoritism," Benjamin said. "It was my concerns about that view that caused me to run, and as a justice I expect to give everybody a fair hearing, regardless of who they are."

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