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## 2001 Decisions

Opinions of the United  
States Court of Appeals  
for the Third Circuit

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7-9-2001

### Bass v. Butler

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Filed July 9, 2001

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 00-1860

DIANNE L. BASS, INDIVIDUALLY AND ON BEHALF OF  
ALL OTHERS SIMILARLY SITUATED,  
Appellant

v.

JOHNNY BUTLER, SECRETARY OF  
LABOR AND INDUSTRY FOR THE  
COMMONWEALTH OF PENNSYLVANIA; RICHARD A.  
HIMLER, DIRECTOR OF THE PENNSYLVANIA BUREAU  
OF WORKERS' COMPENSATION; COMMONWEALTH OF  
PENNSYLVANIA, THROUGH D. MICHAEL FISHER,  
ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY

Appeal from the United States District Court  
For the Eastern District of Pennsylvania  
D.C. No.: 98-cv-4112  
District Judge: Honorable Charles R. Weiner

Argued: January 23, 2001

Before: NYGAARD, ALITO, and ROSENN,  
Circuit Judges.

(Filed: July 9, 2001)

For the Appellant:  
Michael H. Landis, Esquire  
(Argued)  
Ronald J. Smolow, Esquire  
Smolow & Landis  
204 Two Neshaminy Interplex  
Trevose, PA 19053

For the Appellees:  
Claudia M. Tesoro, Esquire  
(Argued)  
Office of the Attorney General  
21 South 12th Street, 3rd Floor  
Philadelphia, PA 19107-3603

#### OPINION OF THE COURT

ROSENN, Circuit Judge.

Dianne Bass ("Bass"), alleging that the Pennsylvania Workers Compensation system denied her benefits through unconstitutional procedures, filed this federal class action against the Commonwealth of Pennsylvania and two of its officials. Bass complained that the Pennsylvania Bureau of Workers Compensation denied her claim without notice that her case was reassigned to, and decided by, workers compensation judges ("WCJs") who were neither present nor presiding when her witnesses testified. Bass also complained that the Pennsylvania statute allowing WCJs to make credibility determinations and ultimate decisions without hearing any witness testimony permitted the taking of property without Due Process of law. 1 Bass sought

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1. The statute in question is referred to as "Section 415 of the Workers Compensation Act," and states:

Transfer of petition to another referee.

At any time before an award or disallowance of compensation or order has been made by a referee to whom a petition has been assigned, the department may order such petition heard before any other referee. Unless the department shall otherwise order, the testimony taken before the original referee shall be considered as though taken before the substituted referee.

77 P.S. S 851 ("Section 415").

declaratory and injunctive relief, costs, and attorneys fees, but no damages.

The District Court, dismissing Bass's action without prejudice, abstained in deference to appellate proceedings in the Pennsylvania courts. Bass filed a motion for reconsideration, which the District Court denied. Since the District Court's order of dismissal and denial of reconsideration, Bass has unsuccessfully exhausted her state court remedies. Bass appealed from the order denying reconsideration. We will vacate the order of dismissal and remand the action for further proceedings.

I.

The first filed action was Bass's state court claim for workers compensation benefits. She filed her federal action approximately six years later. Timing is critical in this action, so important dates will be stated. None of the facts are contested by the parties.

#### A. The Pennsylvania Action

Bass filed a workers compensation claim petition on November 30, 1992, alleging that she sustained a workplace injury on December 20, 1990; she later amended the date of injury to January 8, 1991. The parties bifurcated the issue of whether Bass sustained her injury in the scope of her employment. On October 28, 1994, Workers Compensation Judge ("WCJ") Carol Mickey held that Bass was injured within the scope of her employment. Before deciding the balance of Bass's case, WCJ Mickey resigned, and Bass's case was transferred to WCJ Peter Perry. WCJ Perry received additional testimony and evidence but, before closing the record, he transferred the case to WCJ Michael Rosen. Bass was never notified of the transfer to WCJ Rosen, as required by Pennsylvania law.

After more than five and one-half years had elapsed since filing her claim, two judges who had never heard the claimant or all of her witnesses jointly signed a decision on August 8, 1996, denying Bass's claim. The Workers Compensation Appeal Board ("Appeal Board") affirmed. Bass appealed, arguing, inter alia, that she was denied due

process by the participation of WCJ Rosen. The Commonwealth Court vacated the Appeal Board's order and remanded to allow Bass to establish prejudice arising from the assignment of her claim to WCJ Rosen without notice. See Appx. 325a ("Commonwealth Court's First Opinion"). The Appeal Board, after considering oral argument and briefs, concluded that Bass failed to establish prejudice. See Appx. 83a, 155a. The Appeal Board reinstated the August 8, 1996 order denying relief. On February 18, 2000, the Commonwealth Court affirmed the Appeal Board, stating:

In Bass' [sic] first appeal to this court, we addressed her challenge to the assignment of WCJ Rosen without prior notice to her. . . . At that time, Bass received the appropriate relief in the form of a remand for a determination of whether the assignment to WCJ Rosen without . . . prior notice . . . resulted in prejudice. . . . As the Board noted, on remand Bass failed to make any showing of prejudice but simply argued that substitution is inherently prejudicial. . . .

. . . Bass cannot now assert for the first time that Section 415 of the Workers' Compensation Act is unconstitutional. By her failure to challenge the constitutionality of Section 415 in her first appeal to this court and failure to notify the Attorney General of a facial attack on the statute, Bass has waived this issue. . . . In any case, . . . the participation of WCJ Rosen did not deprive Bass of a fair adjudication by a qualified fact-finder.

Appx. 156a-159a ("Commonwealth Court's Second Opinion"). The Court concluded that even though her facial challenge was procedurally barred, Section 415 was constitutional. See Appx. 159a. The Commonwealth Court also rejected Bass's claim that she was entitled to discovery to create an evidentiary record in support of her claim of actual prejudice. The Court reasoned that Bass was not entitled to inquire into the deliberations of the tribunals that decided her case. See Appx. 159a.

The Pennsylvania Supreme Court denied Bass's petition for allocatur.

## B. The Federal Action

Bass brought her federal action under 42 U.S.C.S 1983 against the Director of the Pennsylvania Bureau of Workers Compensation, the Secretary of Labor and Industry for the Commonwealth of Pennsylvania, and the Commonwealth of Pennsylvania. None of these defendants were parties to her workers compensation action in the state proceedings. Johnny Butler and Richard Himler, the Secretary of Labor and Director of the Pennsylvania Bureau of Workers Compensation respectively, twice moved to dismiss without success; they later answered the complaint. In a Memorandum and Order on April 30, 1999, the District Court held that Bass pleaded a protected property interest, and that Younger and Colorado River abstention were inappropriate because the workers compensation proceedings were still in the administrative courts, which had no authority to decide constitutional issues. See Appx. 173a-175a.

The District Court held hearings on August 30 and September 7, 1999. WCJs Peter Perry and Michael Rosen testified about their roles in Bass's workers compensation case. WCJs Perry and Rosen testified that they had jointly authored the decision denying Bass's benefits, although WCJ Mickey had heard most of the live testimony.

On January 6, 2000, the District Court directed the parties to file dispositive motions; the parties complied. On February 3, 2000, the District Court entered an order stating that:

[T]he interests of comity would best be served by allowing the Pennsylvania courts (in which [Bass] currently has an action similar to action sub judice pending before the Commonwealth Court) . . . to first adjudicate [Bass's claim that her due process rights were denied because her case was not decided by a WCJ who actually heard the case and observed the witnesses and to determine] the constitutionality of Section 415 . . . .

Appx. 271a. The District Court dismissed Bass's case without prejudice to her "reinstating the suit after all appeals are exhausted in the Pennsylvania state courts."

Appx. 271-72. Days later, the Commonwealth Court decided Bass's second appeal adversely to her . She moved the District Court for reconsideration. On May 18, 2000, the District Court denied the motion for reconsideration, and ordered that it would continue to abstain because Bass had not exhausted all of her appeals in the Pennsylvania courts, and because "the decision of the Commonwealth Court which rejected plaintiff's due process claims and upheld the constitutionality of [Section 415] is res judicata on this court." Appx. 284. The District Court cited *Younger v. Harris*, 401 U.S. 37 (1971) and *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976), but performed no further abstention analysis. See Appx. 283a. The District Court explained that Bass's only further recourse was to appeal her state action to the Pennsylvania and United States Supreme Courts. See Appx. 284a.

## II.

Bass's compensation claim has now run the course of Pennsylvania's judicial system, from the workers compensation process to the Pennsylvania Supreme Court. After the District Court entered its final order, the Pennsylvania Supreme Court denied allocatur; there are no longer pending state proceedings. Cf. *Melvin v. Nickolopoulos*, 864 F.2d 301, 305 (3d Cir. 1988) ("[W]e sometimes take judicial notice of subsequent developments not part of the district court record.") (citing *Landy v. Federal Deposit Ins. Corp.*, 486 F.2d 139, 151 (3d Cir. 1973), cert. denied, 416 U.S. 960 (1974)). Hence, abstention is now inapplicable because it provides for federal deference to ongoing, not completed, parallel state proceedings. See *Younger v. Harris*, 401 U.S. 37 (1971); *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976); *Guarino v. Larsen*, 11 F.3d 1151, 1157, 1157 n.1 (3d Cir. 1993). As the District Court contemplated (see order of February 3, 2000), Bass may now resume her federal action. The primary basis of Bass's appeal -- that abstention was inappropriate -- is moot. Therefore, vacatur and remand is appropriate. See *Davis v. Rendell*, 659 F.2d 374, 376 (3d Cir. 1981) ("[T]he issues raised as to the procedure followed by the district court in ruling on the

abstention claim and the correctness of that ruling itself are concededly moot, and a remand would appear to be appropriate"); see also *Melvin*, 864 F.2d at 305 ("[W]e do not think it would be appropriate for us to simply notice the subsequent action of the New Jersey court and then decide the preclusion issue.")

The District Court did not proceed beyond abstention in considering this case,<sup>2</sup> but the defendants on appeal raised serious questions, asserting that the Commonwealth Court's decisions are inextricably intertwined with Bass's attempted federal court Constitutional challenges to Section 415. Therefore, they contend that her challenges to the workers compensation law is barred by the Rooker-Feldman doctrine. The defendants also assert complicated questions pertaining to claim and issue preclusion, even though the defendants in the federal action appear to differ somewhat from those in the state action. See *Chur chill v. Star Enterprises*, 183 F.3d 184, 194 (3d Cir . 1999) (claim preclusion requires party identity or privity). Each of these defenses are vigorously contested by the plaintiffs. In the procedural posture of the case then before the able and experienced District Court, it did not have the benefit of oral argument, briefs of the parties, and the opportunity to decide these complex issues. Additionally, we are concerned with class certification and the justiciability of the class claims, which the District Court judiciously held in abeyance.

Under the facts and posture of the case, we believe it appropriate for the District Court to determine in the first instance the threshold issues, including jurisdiction, preclusion, and class certification. Of course, if Bass passes the threshold, she will be entitled to full judicial process on the merits. The prudential value of having the benefit of District Court consideration and analysis outweighs the

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2. The District Court mentioned *res judicata* in its final order, but the comment was dicta and was unsupported by any rationale. In this case, *res judicata* is a difficult question requiring substantial analysis if the District Court reaches it on remand. The District Court would not reach it should the Court conclude that the Rooker -Feldman doctrine divests it of subject matter jurisdiction.



judicial economy of having this Court dispose of these issues now.<sup>3</sup>

Ordinarily, we would dismiss this appeal because a stay like the one entered by the District Court here usually is not a final order for purposes of 28 U.S.C.S 1291. However, because of the inordinate time consumed by this litigation in the state and federal courts, and the District Court's order dismissing without prejudice to reinstatement of the litigation after exhaustion of remedies in the state courts, we will remand the case to the District Court. <sup>4</sup>

III.

The Order of the District Court will be vacated, and the case remanded for further proceedings consistent with this opinion. Costs taxed against the appellees.

A True Copy:  
Teste:

Clerk of the United States Court of Appeals  
for the Third Circuit

3. We make no judgment whether the District Court committed legal error by abstaining. We base our decision on undisputed events occurring after the District Court entered its final order.

4. Our disposition has the same practical effect as dismissing the appeal, and leaves Bass in the same position as if she re-filed her action in federal court following the Pennsylvania courts' disposition of her state claims. There being "no unyielding jurisdictional hierarchy," *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999), we are within our power to decide the jurisdictional issue of mootness before reaching the much more complicated issue of whether we have appellate jurisdiction. Cf. *Steel Co. v. Citizens for Better Environ.*, 523 U.S. 83, 101 n.3 (1998) (tacitly affirming the practice of deciding Younger abstention issues before determining whether there is a case or controversy). Judge Alito would dismiss the appeal.

