IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2006 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 32778

BERCHIE EUGENE BIAS AND PATRICIA CAROL BIAS,
Plaintiffs,

v.

EASTERN ASSOCIATED COAL CORPORATION,
Defendant.

Certified Question from the Circuit Court of Boone County
Honorable E. Lee Schlaegel, Judge
Civil Action No. 01-C-158

CERTIFIED QUESTION ANSWERED

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JUSTICE BENJAMIN delivered the Opinion of the Court.

CHIEF JUSTICE DAVIS and JUSTICE MAYNARD concur and reserve the right to file a concurring opinion.

JUSTICE ALBRIGHT concurs in part, dissents in part and reserves the right to file a separate opinion.

JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "'The appellate standard of review of questions of law answered and certified by a circuit court is *de novo.*' Syllabus point 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996)." Syllabus point 2, *Keplinger v. Virginia Elec. & Power Co.*, 208 W.Va. 11, 537 S.E.2d 632 (2000).

2. An employer who is otherwise entitled to the immunity provided by W. Va. Code § 23-2-6 (1991) may lose that immunity in only one of three ways: (1) by defaulting in payments required by the Workers' Compensation Act or otherwise failing to be in compliance with the Act; (2) by acting with "deliberate intention" to cause an employee's injury as set forth in W.Va. Code § 23-4-2(d); or (3) in such other circumstances where the Legislature has by statute expressly provided an employee a private remedy outside the workers' compensation system.

3. An employee who is precluded by W.Va. Code § 23-4-1f (1993) from receiving workers' compensation benefits for a mental injury without physical manifestation cannot, because of the immunity afforded employers by W.Va. Code § 23-2-6 (1991), maintain a common law negligence action against his employer for such injury.

Benjamin, Justice:

The Circuit Court of Boone County has certified to this Court the following question of law:

> **Whether an employee who sustains a mental injury without physical manifestation and, as such, is precluded from receiving Workers' Compensation benefits pursuant to West Virginia Code § 23-4-1f, can maintain a common law negligence action against his employer, despite the immunity afforded by West Virginia Code § 23-2-6.**

We answer the question in the negative.

I.

FACTS AND PROCEDURAL HISTORY

The pertinent facts related to the claims of plaintiff, Berchie Eugene Bias, are undisputed and are set forth in the circuit court's certification order:

> This action arises as the result of an incident that occurred on September 18, 1999, at the Harris #1 coal mine located in Boone County, West Virginia, owned and operated by the defendant. On this date, plaintiff, Berchie Bias and two other co-workers were assigned to install a belt take-up in a particular section of the mine. At approximately 10:00 a.m., the three workers observed a cloud of smoke approaching them and

immediately called their supervisor for help from the emergency phone in the jeep they were using. Unbeknownst to the plaintiff and his co-workers at the time, the smoke was the result of belt slippage caused by a slip switch that had been short circuited. The defendant was issued a Federal citation for the short circuited switch. This slip switch, if operable, would shut down the belt in the event of belt slippage to prevent smoking or a possible fire.

Plaintiff and his co-workers were told by the supervisor to shut off the main belt, which was about 100 feet away through a cross cut. While his co-workers attempted to find fresh air, plaintiff went to shut down the main belt. After shutting down the belt, plaintiff indicated that thick smoke had gotten between him and the area in which he had been walking in, and therefore, he did not know where the escape ways were located. Plaintiff went through a door and into a return entry in the opposite direction from the smoke. Plaintiff alleges he knew the return would eventually have smoke in it because the ventilation system was not working properly and he was very afraid. Plaintiff walked down the return about 100 feet and then cut back towards the area in which he had been working in, and eventually ran into two mechanics who began walking him out of the mine. The three eventually ran into a jeep and were transported to the mouth of the entry. Plaintiff alleges he was trapped in the smoke for approximately an hour and a half (1 ½).

Plaintiff worked for the next two days and alleges on the third day he became very distraught. Plaintiff reported he was in a poor emotional state, having slept very little due to nightmares about being trapped in the mine. Plaintiff was transported to Charleston Area Medical Center and then transferred to Highlands Hospital, where he spent 9 days. Plaintiff subsequently brought this action, alleging that as a result of the aforementioned incident, he suffered various serious emotional injuries.

Plaintiff alleges that his employer, Eastern Associated Coal Company

("Eastern"), is liable for his emotional injuries under the "deliberate intention" exception to the West Virginia Workers' Compensation Act, W.Va. Code § 23-4-2 (1994), and also under the common law for its intentional and negligent infliction of such emotional injuries. In support of his motion for a pre-trial ruling that his common law negligence action can be maintained, plaintiff argues that because W.Va. Code § 23-4-1f (1993) precludes him from recovering compensation for his claimed "mental-mental" injuries[1] under the Workers' Compensation Act, the employer immunity provision of the Act, found at W.Va. Code § 23-2-6 (1991), does not apply. Eastern disagrees, contending that the immunity provision bars the plaintiff's civil negligence action for emotional distress despite there being no compensation available for the claimed injury under the Act.

In its Certification Order entered on February 17, 2004, the circuit court found for purposes of the order "that plaintiff can bring a common law negligence action against his employer." The court thereupon ordered that the question referenced above, together with the court's ruling regarding the question, be certified to this Court pursuant to Rule 13 of the *West Virginia Rules of Appellate Procedure.*

II.

[1] Non-physical, or "mental", injuries caused by non-physical, or "mental", causes.

STANDARD OF REVIEW

It is well-settled law that "'[t]he appellate standard of review of questions of law answered and certified by a circuit court is *de novo.'* Syllabus point 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996)." Syl. Pt. 2, *Keplinger v. Virginia Elec. & Power Co.*, 208 W.Va. 11, 537 S.E.2d 632 (2000). *Accord* Syl. Pt. 1, *Perito v. County of Brooke*, 215 W.Va. 178, 597 S.E.2d 311 (2004); Syl. Pt. 2, *Charter Communications v. Community Antenna Serv. Inc.*, 211 W.Va. 71, 561 S.E.2d 793 (2002). Accordingly, we proceed to conduct a plenary review of the certified question.

III.

DISCUSSION

The parties agree with the acknowledgment in the certified question that W.Va. Code § 23-4-1f (1993) precludes an employee such as the plaintiff from receiving workers' compensation benefits for a so-called "mental - mental injury", i.e., a mental injury with a non-physical cause. They disagree as to whether W.Va. Code § 23-2-6 (1991) immunizes an employer against a civil negligence action brought by an employee who alleges a "mental - mental injury" which was incurred in the workplace. Plaintiff contends that the employer-immunity provision of W. Va. Code § 23-2-6 applies only when a workplace injury is compensable and benefits may be recoverable under the Workers' Compensation Act.

Eastern, however, argues that W.Va. Code §§ 23-2-6 and 23-4-1f fully immunize it from all such workers' compensation claims and from all common law causes of action for such non-compensable "mental - mental" injuries, including, as here, a cause of action for negligent infliction of emotional distress where that claimed work-related injury is not compensable by virtue of W.Va. Code § 23-4-1f.

A. Non-Compensable Psychiatric Injuries and Disease

We commence with a discussion of W.Va. Code § 23-4-1f (1993), in part, because Eastern contends that in addition to making so-called "mental-mental" claims non-compensable under the Workers' Compensation Act, the Legislature also evidenced an intent in enacting that section to preclude employees from pursuing common law actions for such injuries. We disagree and conclude that W.Va. Code § 23-4-1f (1993) cannot be read so broadly.

W.Va. Code § 23-4-1f was enacted as a part of Chapter 171, Acts, Regular Session, 1993, that was approved by the legislature on April 16, 1993. It provides:

> For the purposes of this chapter, no alleged injury or disease shall be recognized as a compensable injury or disease which was solely caused by nonphysical means and which did not result in any physical injury or disease to the person claiming benefits. It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this chapter.

The 1993 enactment of W.Va. Code § 23-4-1f was a legislative countermand of this Court's decision in *Breeden v. Workmen's Compensation Commissioner*, 168 W.Va. 573, 285 S.E.2d 398 (1981), which had held as stated in Syllabus Point 2: "An employee who sustains mental or emotional injury which occurs as a result of continuous and intentional harassment and humiliation from her supervisor extending over a period of time has suffered a personal injury as required by W.Va. Code § 23-4-1 (1981 Replacement Vol.)."[2] Despite its repudiation by the Legislature, *Breeden* is noteworthy in two respects. First, it recognized that an emotional injury is a personal injury for purposes of the Workers' Compensation Act. Second, it recognized that the infliction of emotional distress may be a compensable injury even though not accompanied by a physical injury, despite the fact that at the time of the *Breeden* decision, in 1981, it was the general rule that there was no common law cause of action in this State for the negligent infliction of emotional distress absent a physical injury. *Breeden*, 168 W.Va. at 650-654, 285 S.E.2d at 635-639.

Neither the title of the bill in which W. Va. Code § 23-4-1f was enacted, nor the text of that Code section indicates any expressed intent on the part of the legislature to immunize employers from a common law action which may have existed at the time of its passage for negligent infliction of emotional distress upon an employee when not

[2] In *Marlin v. Bill Rich Construction, Inc.*, 198 W.Va.635, 650, 482 S.E.2d 620, 635 (1996), this Court observed that "in 1993, the West Virginia Legislature rejected [*Breeden's*] compensability of mental-mental claims when it added W.Va. Code § 23-4-1f to the workers' compensation statute."

accompanied by a physical injury. Eleven years following *Breeden*, but before the passage of W.Va. Code § 23-4-1f, our common-law departed from the requirement that emotional claims be manifested, at least in part, by demonstrable physical injuries. In *Marlin* we acknowledged that *Ricottilli v. Summersville Memorial Hospital*, 188 W.Va. 674, 425 S.E.2d 629 (1992), which this Court decided on December 18, 1992, five months before the enactment of W.Va. Code § 23-4-1f (1993), "represent[ed] a transition from our earlier law requiring that a claim for negligent infliction of emotional distress be accompanied by demonstrable physical injuries" and "a progression by this Court away from the requirement of a precedent physical injury in order to recover in cases involving negligent infliction of emotional distress." *Marlin*, 198 W.Va. at 651-2, 482 S.E.2d at 636-7. At the time of the passage of W.Va. Code § 23-4-1f (1993) on April 16, 1993, the Legislature not only had notice of, but, we believe, was fully aware of this Court's decision in *Ricottilli* and its transition from the general rule that a negligent infliction of emotional distress claim must be manifested by a physical injury. In view of this notice and awareness, we conclude that had the Legislature intended W.Va. Code § 23-4-1f to preclude any claims other than workers' compensation claims, the Legislature would have done so in clear language.

Because we conclude that the Legislature was fully aware of *Ricottelli* at the time of the passage of W.Va. Code § 23-4-1f, we find nothing in that statutory section to support Eastern's contention that W.Va. Code § 23-4-1f evidences any intention by the Legislature to affect any type of claims other than workers' compensation claims. Rather,

we believe, W.Va. Code § 23-4-1f is a narrowly drawn statute intended by the Legislature to focus solely on whether so-called psychological (or mental) claims can be compensable and whether workers' compensation benefits may be recoverable unless that psychological (or mental) claim is manifested, at least in part, by a demonstrable physical symptom or injury. As for immunity from common-law actions, this statutory section is silent. Any prohibition of such common-law actions must instead by found elsewhere in the law.[3]

B. Employer Immunity and W.Va. Code § 23-2-6 (1991)

Consideration of whether an employee who sustains a mental injury without physical manifestation may maintain a common law negligence action against his employer necessarily must be resolved by application of W.Va. Code § 23-2-6 (1991). This Code section provides in relevant part that "[a]ny employer subject to this chapter who shall subscribe and pay into the workers' compensation fund the premiums provided by this chapter or who shall elect to make direct payments of compensation as herein provided shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring." This immunity language was a part of the original workers' compensation law, Acts 1913, Ch.10, § 22 and has not been substantively changed

[3] It is perhaps not surprisingly that W.Va. Code § 23-4-1f is silent as to employer immunity in view of the language in W.Va. Code §§ 23-2-6 and 23-4-2(d)(1) and (2). *See note* 12 *infra*.

since 1913 in the various re-enactments of the Code section in which it appears.

The Legislature intended for W.Va. Code § 23-2-6 (1991) to provide qualifying employers sweeping immunity from common-law tort liability for negligently inflicted injuries. As this Court succinctly stated in *State ex rel. Frazier v. Hrko*, 203 W.Va. 652, 659, 510 S.E.2d 486, 493 (1998), "[w]hen an employer subscribes to and pays premiums into the Fund, and complies with all other requirements of the Act, the employer is entitled to immunity for any injury occurring to an employee and 'shall not be liable to respond in damages at common law or by statute.' W.Va. Code § 23-2-6 [1991]." This immunity is not easily forfeited. As suggested in *Smith v. Monsanto Company*, 822 F.Supp. 327, 330 (S.D. W.Va. 1992), "an employer who is otherwise entitled to immunity under § 23-2-6 may lose that immunity in only one of two ways: (1) by defaulting in payments required by the Act or otherwise failing to comply with the provisions of the Act, see W.Va. Code § 23-2-8, or (2) by deliberately intending to produce injury or death to the employee."[4] (Citation omitted.)

[4] Deborah A. Ballam, *The Workers' Compensation Exclusivity Doctrine: A Threat to Workers' Rights Under State Employment Discrimination Statutes*, American Business Law Journal, 95, 102-106 (Spring, 1989), describes the exclusivity doctrine as being the "Sacred Cow of Workers' Compensation" stating that "most courts and state legislatures have vigorously protected the concept of employer immunity by aggressively promoting the exclusivity doctrine, even in cases where the injury did not arise from normal incidents of the employment. Courts have protected the doctrine by refusing, for the most part, to allow judicially created exceptions, while the legislatures have protected the doctrine by reacting with legislation repealing the few efforts the courts have made to reduce its scope."

While exceptions to the immunity provided by W.Va. Code § 23-2-6 exist, the Legislature has been extremely restrictive in creating them.[5] An employer who defaults on its payments as required by the Workers Compensation Act or is otherwise out of compliance with the Act has no immunity according to the plain language of W.Va. Code § 23-2-6. An employer is likewise not immune from lawsuit for workplace injuries if the employer "acted with deliberate intention" as provided in W.Va. Code § 23-4-2. An employer is also not immune from liability for certain other intentional actions, such as discriminatory practices as provided in W.Va. Code § 23-5A-1 *et seq*. and in The West Virginia Human Rights Act, W.Va. Code § 5-11-1 *et seq*.[6]

Plaintiff argues that our decision in *Jones v. Rinehart & Dennis Company, Inc.*, 113 W.Va. 414, 168 S.E. 482 (1933), supports his position that because his claimed mental injury without physical manifestation is not compensable by reason of W.Va. Code § 23-4-

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[5] *See, generally,* Davis, Robin J. & Louis J. Palmer, Jr., *Workers' Compensation Litigation in West Virginia: Assessing the Impact of the Rule of Liberality and the Need for Fiscal Reform*, 107 W.Va. LR 43, 62 (2004).

[6] "While an aggravation or worsening of an employee's physical injury by the conduct of his/her employer may be compensable under and thus subject to, the exclusive remedy provided by the Workers' Compensation Act, an employee's claim against an employer for violation of the West Virginia Human Rights Act and resulting non-physical injuries, such as mental and emotional distress and anguish, directly and proximately resulting from such violation and not associated with the physical injury or the aggravation or worsening thereof are not barred by the exclusivity provisions of the Workers' Compensation Act." Syl. Pt. 4, *Messer v. Huntington Anesthesia Group, Inc.*, 218 W.Va. 4, 620 S.E.2d 144 (2005).

1F, his employer should not be immune to a common law negligence action for that injury under W.Va. Code § 23-2-6. Specifically, plaintiff contends that in *Jones*, which considered the disease of silicosis, this Court created another exception to W.Va. Code § 23-2-6 (1923) for injuries such as he claims here. We disagree. Even if *Jones* had not been legislatively nullified by subsequent statutory enactments, plaintiff's injury claim herein is not of a type similar to the disease claim present in *Jones*.[7]

In *Jones*, this Court, in 1933, distinguished between work-related harm which was caused by a definite, isolated, fortuitous occurrence, for which the workers' compensation system had originally been enacted,[8] and a disease such as silicosis, which was caused by exposure to silica extending through a long period of employment, which was not of a type originally cognizable under W.Va. Code § 23-4-1. In view of the Legislature's original decision for the workers' compensation system, by way of W.Va. Code § 23-4-1 (1923), to recognize only work-related injuries and diseases which were caused by definite,

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[7] W.Va. Code § 23-4-1 was amended by the Legislature in 1945 to recognize silicosis as an "injury" or "personal injury" for purposes of compensability and benefits determinations within the workers' compensation system. W.Va. Code § 23-4-1 was further amended by the Legislature in 1949 to recognize "other occupational diseases" as injuries for purposes of compensability and benefits determinations within the workers' compensation system.

[8] The Court cited as an example of such an injury/disease caused by a "sudden, isolated, fortuitous occurrence", the facts in *Conley v. State Compensation Comm'r.*, 107 W.Va. 546, 149 S.E. 666 (1929). There, an employee experienced nervousness and headache requiring him to cease work as the result of carbon monoxide poisoning stemming from his soldering of spouting with a gasoline soldering torch.

isolated fortuitous events, the *Jones* Court concluded that the immunity provisions of W.Va. Code § 23-2-6 were only applicable to such injuries and diseases, since they were all that was then cognizable under W.Va. Code § 23-4-1 (1923). Since silicosis was not a disease which was then cognizable under W.Va. Code § 23-4-1 (1923), the *Jones* Court held in its Syllabus Point 4 that employers "are not exempt from liability for non-compensable disease (caused by negligence of the employer) or death resulting from such disease."

The holding of the *Jones* Court was effectively annulled in 1945, by the Legislature's subsequent decision to amend W.Va. Code § 23-4-1 to recognize the disease of silicosis. Four years later, in 1949, the Legislature expanded W.Va. Code § 23-4-1 to recognize "other occupational diseases" which might occur in the workplace so long as the injury or disease occurred both in the course of and resulting from a claimant's employment. As we stated in *Powell v. State Workers' Comp. Comm'r*. 166 W.Va. 327, 273 S.E.2d 832 (1980), occupational diseases other than those specifically listed have been covered by W.Va. Code § 23-4-1 since it was amended by the Legislature in 1949. *See, also, Miles v. State Compensation Comm'r.*, 136 W.Va. 183, 67 S.E.2d 34 (1951). Thus, the reasoning from *Jones* which the plaintiff urges upon us was legislatively nullified.

Even if such reasoning were still valid, the so-called "mental-mental injury" at issue herein, occurring within a period of 90 minutes or so, was not at all similar to the slowly developing kind of disease at issue in *Jones*. Rather, it was apparently caused by a

"definite, isolated, fortuitous, occurrence" when plaintiff was trapped in a smoky environment within a mine. As such, the type of claim at issue here is much more like that of a typical injury claim, than that in the *Jones* case. The employer immunity provisions of W.Va. Code § 23-2-6 always have been applicable to such claimed injuries.

Nor is plaintiff's attempt to invoke *Jones* helped by *Breeden*. In its Syllabus Point 2, the *Breeden* Court held that a mental or emotional injury *is* a "personal injury" for purposes of the Workers' Compensation Act. *Breeden* therefore removes any doubt that, as of 1983 when *Breeden* was decided, psychological (or mental) claims were of a type cognizable under W.Va. Code § 23-4-1.[9] In later enacting W.Va. Code § 23-4-1f, the Legislature did not eliminate psychological (or mental) claims from the workers' compensation system. It simply forbid making such claims compensable and paying benefits when no physical harm was manifested. The type of injury present in *Jones* and the rationale used by the Court in *Jones* simply is not present here. By its terms, the employer immunity provision of W.Va. Code § 23-2-6 is applicable to such an injury and has been so since the Workers' Compensation Act was enacted.

The Legislature has gone further in setting forth a broad exclusion for employers

[9] We also note that the question certified itself refers to the occurrence at the heart of the certified question herein as an "injury."

from common-law negligence actions for work-related injuries to employees. In 1983, the Legislature made perfectly clear its intent that the employer immunity provided by W.Va. Code § 23-2-6 was sweeping when it enacted what is now W.Va. Code § 23-4-2(d)(1) and (2).[10] Therein, the Legislature stated:

> [T]he immunity established in sections six and six-a, article two of this chapter is an essential aspect of this workers' compensation system . . . . [T]he intent of the Legislature in providing immunity from common lawsuit was and is to protect those immunized from litigation outside the workers' compensation system except as expressly provided in this chapter . . . . The immunity from suit provided under this section and under sections six and six-a, article two of this chapter, may be lost only if the employer or person against whom liability is asserted acted with "deliberate intention".

W.Va. Code §§ 23-4-2(d)(1) and (2) (2005). Our Legislature has thus instructed the Court that we are not to read into the immunity provision of W.Va. Code § 23-2-6 an exception not "expressly provided [by the legislature] in this chapter."

W.Va. Code § 23-2-6 expressly provides employers with "immunity from common lawsuit" and "litigation" for common-law claims, such as the so-called "mental-mental" negligence claim asserted herein by plaintiff. We conclude that the Legislature

[10]What is presently subsection (d)(1) and (2) of W. Va. Code § 23-4-2 was subsection (c) (1) and (2) in the 1983 enactment. Except for the change in the subsection designation, the substance of the 1983 enactment then contained in subsection (c)(1) and the first paragraph of subsection (c)(2) has not been changed since then.

intended for W.Va. Code § 23-2-6 to provide qualifying employers with a sweeping immunity from common-law tort liability for negligently caused work-related injuries. We are compelled to respect this intention and apply the plain language of W.Va. Code 23-2-6.

We therefore hold that an employer who is otherwise entitled to the immunity provided by W.Va. Code § 23-2-6 (1991) may lose that immunity in only one of three ways: (1) by defaulting in payments required by the Workers' Compensation Act or otherwise failing to be in compliance with the Act; (2) by acting with "deliberate intention" to cause an employee's injury as set forth in W.Va. Code § 23-4-2(d); or (3) in such other circumstances where the Legislature has by statute expressly provided an employee a private remedy outside the workers' compensation system. Compensability of a claimed injury and the immunization of an employer from litigation therefore are independent of one another. An employee who is precluded by W. Va. Code § 23-4-1f (1993) from receiving workers' compensation benefits for a mental injury without physical manifestation cannot, because of the immunity afforded employers by W.Va. Code § 23-2-6 (1991), maintain a common law negligence action against his employer for such injury.

IV.

CONCLUSION

For the reasons set forth herein, we answer the certified question in the negative.

If we were to answer the question in the affirmative, this Court would improperly exercise a legislative function by reading into W.Va. Code § 23-2-6 an exception to the sweeping immunity provided which the Legislature chose not to provide therein. Under our system of government, the Legislature is a coordinate branch of government and is empowered to make law and establish public policy in conformity with the federal and state constitutions. The question certified to us presents no constitutional issue and the parties have not asserted one. This Court's response is limited to the narrow statutory question certified.

Certified Question Answered.