No. 32778 – *Berchie Eugene Bias and Patricia Carol Bias v. Eastern Associated Coal Corporation*

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Albright, Justice, concurring, in part, and dissenting, in part:

I concur with the conclusion reached by the majority that West Virginia Code § 23-4-1f (1993) (Repl. Vol. 2005) solely addresses the compensability of mental-mental claims[1] and, because of its limited scope, does not answer the question certified to this Court as to whether a common law negligence action can be maintained by an employee who sustains a mental injury that lacks an accompanying physical manifestation. Following that conclusion, however, I part ways with the both the reasoning and the ultimate conclusion reached by the majority that the immunity extended to employers subscribing to the state workers' compensation system under the provisions of West Virginia Code § 23-2-6 (2003) (Repl. Vol. 2005) bars a common law negligence action for a mental-mental claim.

The analysis employed by the majority to conclude that the statutory provision extending immunity to subscribing employers bars recovery for a mental-mental claim under common law negligence principles is easily dismantled. To reach its conclusion, the majority attempts to distinguish settled case law that actually supports the existence of a

[1]By this, I am referring to a mental injury that is independent of either a physical injury or manifestation.

common law mental-mental claim and emphasizes the limited statutory exclusions to employer immunity. Critically absent from the majority's analysis, however, is any reference to the "quid pro quo" nature of workers compensation.[2] The question of whether a remedy exists for a mental-mental claim – a claim that currently exists under the common law of this state[3] – must include a balanced consideration of the "quid pro quo" bargain which undergirds the workers compensation schema. Only then can the question of an available remedy be definitively answered.

The author of the majority opinion recently revisited the origins of workers' compensation in *Messer v. Huntington Anesthesia Group, Inc.*, 218 W.Va. 4, 620 S.E.2d 144 (2005). Explaining the tradeoffs involved, this Court observed:

> "The benefits of this system accrue both to the employer, who is relieved from common-law tort liability for negligently inflicted injuries, and to the employee, who is assured prompt payment of benefits." . . . "That philosophy has commonly been described as a *quid pro quo* on both sides: in return for the purchase of insurance against job-related injuries, the employer receives tort immunity, in return for giving up the right to sue the employer, the employee receives swift and sure benefits."

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[2]*See Smith v. Monsanto Co.*, 822 F.Supp. 327, 330 (S.D. W.Va. 1992) (recognizing that benefits of employer immunity accrue both to employer, who is relieved from common-law tort liability for negligently inflicted injuries, and to employee, who is assured prompt payment of benefits).

[3]*See Marlin v. Bill Rich Constr. Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (1996); *Ricottilli v. Summersville Memorial Hosp.*, 188 W.Va. 674, 425 S.E.2d 629 (1992).

Messer, 218 at __, 620 S.E.2d at 149 (quoting *State ex rel. Abraham Linc Corp. v. Bedell*, 216 W.Va. 99, 103, 602 S.E.2d 542, 546 and n.7 (2004) (citations omitted). At the heart of any workers' compensation schema is a recognition that in exchange for extending statutorily designated benefits for workplace injuries, an employer gains a guarantee that this statutory system of recovery is the exclusive means for compensating his/her employees, barring any statutory exceptions. *See* W.Va. Code § 23-2-6; *see generally Larson's Workers' Compensation Law* § 100.01 (discussing *quid pro quo* nature of workers' compensation).

While the exclusive nature of workers compensation recovery passes intellectual muster where the injury is compensable, a different result obtains when the injury is expressly excluded from recovery under a statutory system of benefits. In those instances, the foundational predicate for the exclusivity doctrine – the *quid pro quo* – is noticeably missing. In recognition of this void, a leading commentator and authority in the area of workers' compensation has posited that "it ought logically to follow that the employer should be spared damage liability only when compensation liability has actually been provided in its place, or," stated differently, "rights of action for damages should not be deemed taken away except when something of value has been put in their place." *Larson's*, *supra,* at § 100.04.

This rationale – that exclusivity only exists where coverage exists – has been relied upon by numerous courts to permit recovery. To illustrate, in *Kleinhesselink v. Chevron*, 920 P.2d 108 (Mont. 1996), the court held that because the workers' compensation act expressly excluded emotional and mental stress injuries, an employer was not protected for tort liability for claims based on such injuries. The same result obtained in *Perodeau v. City of Hartford*, 792 A.2d 752 (Conn. 2002), where the court ruled that the exclusivity provision of the workers' compensation act did not bar the plaintiff's claim for intentional infliction of emotional distress because that type of claim was expressly excluded from compensability under the act. *See also Acevedo v. Consol. Edison Co.*, 572 N.Y.S.2d 1015 (N.Y. Sup. 1991) (holding that plaintiffs' claims for medical monitoring were not barred by exclusiveness doctrine since claims of that sort fall outside jurisdiction of workers' compensation); see additional cases at *Larson's*, *supra*, § 100.04D.

Interestingly, this same rationale was applied by the author of the majority to reason in *Messer* that the exclusivity provision of the workers' compensation act[4] was inapplicable with regard to claims for injuries caused by unlawful discriminatory acts where those injuries "are of a type not otherwise recoverable under the Workers' Compensation Act." 218 W.Va. at __, 620 S.E.2d at 146, syl. pt. 4, in part. Critical to the decision in *Messer* was the unavailability of compensation for injuries such as mental and emotional

[4]*See* W.Va. Code § 23-2-6.

distress and anguish that were not associated with a physical injury. *Id.* at __, 620 S.E.2d at 161. Relying on the fact that the "Legislature did not intend such injuries to fall within the types of injuries for which the Workers' Compensation Act was established," the Court found the exclusivity provision not to bar an action outside the confines of the workers' compensation schema. *Id.* at __, 620 S.E.2d at 160. Instead of recognizing that the reasoning employed in *Messer* would analogously compel the conclusion that recovery could exist for a mental-mental claim outside the area of workers' compensation, the majority downplayed the significance of that decision by relegating its citation to a footnote and omitting any discussion of the reasoning applied in that case.

In contrast to its treatment of *Messer*, the majority squarely, but incorrectly, confronted the existence of an earlier decision of this Court which clearly held that recovery for workplace injuries not encompassed within the workers' compensation act could be sought under common law principles. In *Jones v. Rinehart & Dennis Co.*, 113 W.Va. 414, 168 S.E. 482 (1933), this Court ruled that compensation for the disease of silicosis could be sought against an employer outside the workers' compensation act. That decision was predicated on the fact that the workers' compensation system, as it existed at that time, provided compensation only for work-related injuries caused by definite, isolated events. *Id.* at 423, 168 S.E. at 486. Based on the non-inclusion of silicosis as a compensable injury under the previous, narrower definition of injury that involved a specific and definite event,

this Court ruled in *Jones* that the exclusivity provision of the workers' compensation act was inapplicable.

The majority simply "reasons away" the applicability of the *Jones* case by suggesting that, due to the later amendment of the workers' compensation statutes to include occupational diseases such as silicosis, the holding in that case has been legislatively nullified. What the majority fails to comprehend is that the key component of *Jones* as controlling precedent is not the literal holding that the exclusivity provision is inapplicable to silicosis claims, but more importantly the reasoning employed by this Court to reach that decision. Rather than focusing on the narrow issue of whether silicosis claims are within the legislative ambit of compensable workers' compensation claims, what the majority should have examined in deciding whether the reasoning of *Jones* is still controlling was the analysis the Court used to determine that the workers' compensation exclusivity provision was not a bar to a common law claim in that case.

Critically, the reasoning employed in *Jones* is on all fours with the analysis that Larson identifies in his worker's compensation treatise and that courts around the country have employed to allow common law suits where injuries are not of the type compensable under the applicable statutory scheme. In determining whether a common law suit could be maintained for silicosis, this Court determined in *Jones* that the statutory

language which affords immunity to subscribing employers ("is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring")[5] "must not be determined from its cold phraseology alone."[6] 113 W.Va. at 419, 168 S.E.2d at 484. Rejecting outright the contention that "an action for damages by an employee against an employer for injury arising from the employment may not be maintained [outside the statutory scheme] even though such injury or disability is not compensable," this Court determined that the meaning of the immunity provision had to be resolved in conjunction with additional relevant indicia of intent:

> Consideration must be given to the background and purpose of compensation acts, to the evils sought to be corrected and the objects to be attained; to the rules of the common law with relation to right of action for industrial injuries and diseases, both occupational and otherwise; to the legislative history of our own act; and to all portions of the act which may be of assistance in determining the legislative intent . . . .

Id. at 419, 168 S.E.2d at 484.

Of import to this Court in *Jones* was the precept that a "right of action is [not to be] taken from employees unless the statutory language is clear and concise and not

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[5]W.Va. Code § 23-2-6.

[6]The Court acknowledged in *Jones* that if this language were viewed in isolated fashion, without reference to legislative intent or the history of worker's compensation, then no recovery could be sought outside the workers' compensation scheme for injuries in those instances where compensation was not provided under the statutory scheme. 113 W.Va. at 419, 168 S.E.2d at 484. Importantly, this interpretation of the immunity language was expressly rejected in *Jones*.

subject to any other reasonable construction." 113 W.Va. at 425, 168 S.E.2d at 487. Stressing that where two statutory constructions are available, courts prefer to choose the construction that does not take away a right and the means of obtaining redress for its breach, the Court in *Jones* concluded that the immunity provision set forth in West Virginia Code § 23-2-6 only exempted employers from liability at common law or by statute for compensable injury or death but not for non-compensable disease. 113 W.Va. at 426, 168 S.E.2d at 487.

The reasoning employed in *Jones* – that immunity is only extended to compensable injuries – was recently recognized in *Ball v. Joy Manufacturing Co.*, 755 F.Supp. 1344 (S.D. W.Va. 1990), *aff'd*, 958 F.2d 36 (4th Cir. 1991), when the federal district court was asked to decide whether workers exposed to toxic chemicals had a common law claim for emotional distress. In *Ball*, the district court found the reasoning of *Jones*, despite the passage of time, to be germane based on the fact that the Legislature had not adopted any measures to refute this Court's interpretation that the immunity extended by West Virginia Code § 23-2-6 to subscribing employers is not applicable where the injuries at issue are outside the coverage of the workers' compensation act.[7]

[7]While the majority suggests the adoption of language found in West Virginia Code § 23-4-2(d)(1) addressing the intent of chapter four is specific evidence of legislative action aimed at countering the rationale employed in *Jones*, that language does not expressly address the availability of immunity to an employer despite the existence of non-compensable injury or disease. Barring such a clear statement of legislative intent, the issue (continued...)

While not directly citing *Jones,* this Court closely followed its reasoning in *Messer*. Starting with the proposition that "the most significant word in the exclusivity provision of W.Va. Code § 23-2-6 . . . is the term 'injury,'" this Court found that "other provisions of the Workers' Compensation Act [are required] to determine the Legislature's intent in defining what is and is not a compensable 'injury' for purposes of the exclusivity provision." 218 W.Va. at ___, 620 S.E.2d at 151. Expressly citing the adoption of West Virginia Code § 23-4-1f, which exempts mental-mental claims from being compensable injuries, this Court emphasized in *Messer* that the Legislature intended that certain work-related injuries and diseases are outside the meaning of the term "injury." Concluding that the extension of immunity to employers under West Virginia Code § 23-2-6 is controlled by the definition of the term "injury," the Court in *Messer* found that the "list of work-related injuries exempted from the provisions of the Workers' Compensation Act" (expressly referencing mental-mental claims) directly correlated to the availability of the immunity provision. 218 W.Va. at ___, 620 S.E.2d at 151. Under this Court's analysis in *Messer*, the existence of a qualifying compensable injury within the meaning of workers' compensation law is coterminous with the extension of immunity to employers. Just as in *Jones*, this Court reasoned in *Messer* that where the worker's injuries "are of a type not otherwise recoverable under the Workers' Compensation Act . . . the exclusivity provision of the Workers'

[7](...continued)
of immunity for non-compensable claims remains subject to judicial interpretation.

Compensation Act is inapplicable." *Messer,* 218 W.Va. at __, 620 S.E.2d at 146, syl. pt. 4, in part.

Within less than a year of the issuance of *Messer*, the opinion of this Court has inexplicably shifted 180 degrees. Whereas, this Court previously took the view that the immunity afforded to subscribing employers under the exclusivity provision of the workers' compensation act could only be invoked in connection with injuries for which recovery was available under the act,[8] now the tides have changed and employers are granted immunity irrespective of compensability. Significantly, the majority has failed to persuasively identify any legitimate basis for this drastic shift in statutory construction.

In addition to its failed attempt at distinguishing *Jones*, the majority also falls short in its emphasis on the language of West Virginia Code § 23-4-2(d)(1) as support for its conclusion. While that statement of legislative intent addresses when immunity from suit can be lost by an employer, it does not address the parameters regarding the existence of immunity in the first instance. That matter is solely controlled by West Virginia Code § 23-2-6. If an injury that is covered under the act is the predicate basis for invoking an

[8]*See* Annotation, *Workmen's Compensation Act as exclusive of remedy by action against employer for injury or disease not compensable under act,* 100 A.L.R. 519 (1936) and (WL Supp. 2006) (recognizing that West Virginia and many other states interpret exclusivity provision of workers' compensation act as granting immunity from common law suit only when workplace injury is compensable).

employer's immunity (which was always the position of this Court before *Bias*), then the absence of such a predicate arguably prevents the immunity provision from operation. The majority goes seriously astray by hanging its analysis on the fact that under West Virginia Code § 23-4-2(d)(1) immunity can be lost in only one of three ways. What the majority fails to recognize is that the issue under discussion is not the *loss* of immunity but the *existence* or applicability of immunity in the first instance. These are two distinct issues; a fact which the majority fails to grasp. If no immunity attaches due to the injury being outside the act, the provisions that control the loss of employer immunity are of no consequence.

Nowhere in its opinion does the majority address the issue of whether there are due process implications in denying a remedy for an existing right. This Court has recognized that "[t]he *quid pro quo* for the employees is the guarantee that they will be afforded due process, and proper restitution for injuries they receive in their line of work." *Javins v. Workers' Comp. Comm'r*, 173 W.Va. 747, 758, 320 S.E.2d 119, 131 (1984). Under the majority opinion, employees are now left without a remedy for mental-mental claims that come within the parameters of those claims that we have previously recognized[9] as viable independent from physical injury. And, by completely denying employees a cause of action for qualifying mental-mental claims, "a wrong could be inflicted for which no remedy would lie, a circumstance that 'is contrary to the traditional policy of the common

[9]*See supra* note 3.

law.'" *Farley v. Sartin*, 195 W.Va. 671, 681, 466 S.E.2d 522, 532 (1995) (quoting *Baldwin v. Butcher*, 155 W.Va. 431, 444, 184 S.E.2d 428, 435 (1971)); *see also Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333 (Or. 2001) (finding that exclusive remedy provisions of workers' compensation statute which operated regardless of whether claim was compensable were unconstitutional based on the denial of remedial process).

The decision reached by the majority flies in the face of the fact that non-physical harms have been recognized as "[a]n increasingly important category of work-related injuries supporting tort suits." Larson, *supra*, at § 100.04. Despite the fact that these non-physical claims, which include mental-mental injuries, are increasingly recognized as a by-product of the modern workplace, the majority has seemingly turned its collective back on such claims. Because this Court has failed to offer a credible and convincing analysis for the directional change in statutory construction and has only overruled *Jones sub silentio*, I must respectfully dissent.

I am authorized to state that Justice Starcher joins in this separate opinion.