

No.33210 – *SER Donald Darling v. Darrell V. McGraw, Attorney General of the State of West Virginia, and State of West Virginia Board of Risk and Insurance Management*

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SUPREME COURT OF APPEALS

OF WEST VIRGINIA

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

While I concur with the majority’s conclusion that Mr. Darling has failed to demonstrate the requirements for the issuance of a writ of mandamus, I dissent to emphasize, as I previously articulated in my partial dissent to *Bias v. Eastern Associated Coal Corp.*, 220 W.Va. 190, 640 S.E.2d 540 (2006) (Albright, J., concurring, in part, dissenting, in part), that the majority is wrong in concluding that West Virginia Code § 23-2-6 (2003) (Repl. Vol. 2005) bars a common law negligence action for a mental-mental claim.¹ I was convinced then and am even more convinced now that “the existence of a qualifying compensable injury within the meaning of workers’ compensation law is coterminous with the extension of immunity to employers.” *Bias*, 220 W.Va. at ___, 640 S.E.2d at 550 (Albright, J., concurring, in part, dissenting, in part). Because there is no question that a “mental-mental” claim is expressly excluded by the terms of West Virginia Code § 23-4-1(f) (1993) (Repl. Vol. 2005) from the workers’ compensation schema, I remain resolute in my

¹While Mr. Darling is adamant that the mandamus petition he filed with this Court is not predicated in common law (he characterizes it as solely statutory in nature), the essence of a “mental-mental” claim that falls outside the statutory parameters of workers’ compensation is clearly negligence.

opinion that employers do not have immunity from common law claims which arise from “mental-mental” injuries.

If you accept that immunity from common-law claims is nonexistent for claims that are not within the scope of workers’ compensation law, logic requires that employees be permitted to seek recovery for “mental-mental” claims from their employers under common law precepts. As I discussed in my partial dissent to *Bias*, when the *quid pro quo* nature of workers’ compensation has been shown to be illusory, as in the case of “mental-mental” claims, the rationale for extending immunity to employers for such work-related claims is similarly nonexistent. A well-recognized commentator has observed 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, to state the matter from the employee’s point of view, rights of action for damages should not be deemed taken away except when something of value has been put in their place.” Arthur Larson & Lex K. Larson, *Larson’s Workers’ Compensation Law* § 100.04, 100-23 (2006); see *Williams v. Hillsborough County School Bd.*, 389 So.2d 1218, 1219 (Fla. 1st Dist. App. 1980) (holding that employee whose work-related neurosis was not compensable under workers’ compensation act due to lack of physical injury could seek common law remedies); *Maney v. Louisiana Pacific Corp.*, 15 P.3d 962, 966 (Mont. 2000) (recognizing that “[i]f an employee’s injury is not compensable under the [Workers’ Compensation] Act, the exclusive

remedy provision does not preclude a tort action against the employer”); *Smother v. Gresham Transfer, Inc.*, 23 P.3d 333 (Or. 2001) (rejecting exclusive remedy provision of workers’ compensation act as unconstitutional on grounds that there was no *quid pro quo* within statutory system to counter loss of right to sue); *Nassa v. Hook-SupeRx, Inc.*, 790 A.2d 368, 375 (R.I. 2002) (holding that the workers’ compensation “exclusive-remedy provision bars an independent lawsuit only when an employee suffers ‘an injury’” for which compensation is available).

Firmly believing that the benefit of the bargain analysis which underlies the establishment of a workers’ compensation system completely fails when recovery is expressly denied by statute for an employment-related injury, I reaffirm my opinion that the result reached by the majority in *Bias* should be overruled. *See* W.Va. Code § 23-4-1(f).

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