

No. 31739 - Theresa D. Messer v. Huntington Anesthesia Group, Inc., Dr. Farouk Abadir, Dr. Hosney S. Gabriel, Dr. Mark Newfeld, Dr. Richardo Ramos, Dr. Alfredo Rivas, Dr. D. Grant Shy, Dr. Stanislav Striz and Dr. Michael Vega

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OF WEST VIRGINIA

Maynard, Justice, dissenting:

Once again, the majority is chipping away at the immunity provided to employers by the Workers' Compensation Act. Ignoring the plain language of the exclusivity provisions of W.Va. Code §§ 23-2-6 and 23-2-6a, the majority has now determined that an employee can pursue both a worker's compensation claim and a human rights claim for the same workplace injury. Because I believe that the statutory provisions of both the Workers' Compensation Act and the West Virginia Human Rights Act clearly establish that the sole recourse for the appellant to recover for her workplace injuries is the workers' compensation system, I dissent to the majority's decision in this case.

This Court has long held that, "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus Point 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).

W.Va. Code § 23-4-6 plainly states that,

Any employer subject to this chapter who subscribes and pays into the workers' compensation fund the premiums provided by this chapter or who elects to make direct payments of compensation as provided in this section *is not liable to respond*

in damages at common law or by statute for the injury or death of any employee, however occurring, after so subscribing or electing, and during any period in which the employer is not in default in the payment of the premiums or direct payments and has complied fully with all other provisions of this chapter.

(Emphasis added). In addition, W.Va. Code § 23-4-6a provides,

The immunity from liability set out in the preceding section shall extend to every officer, manager, agent, representative or employee of such employer when he is acting in furtherance of the employer's business and does not inflict an injury with deliberate intention.

The language of these statutes clearly bars the appellant's cause of action under the Human Rights Act for her workplace injury.

Furthermore, the equally clear and unambiguous language of the West Virginia Human Rights Act does not indicate any intent by the Legislature to preempt, repeal, or supercede the exclusivity provisions of the Workers' Compensation Act. This Court always presumes that the Legislature is aware of existing law and intends its legislative enactments to harmonize therewith. Syllabus Point 5, *State v. Synder*, 64 W.Va. 659, 63 S.E. 385 (1908). Since the Human Rights Act was enacted after the Workers' Compensation Act, it must be presumed that absent any language to the contrary, the Legislature did not intend to preempt the exclusivity provisions of the Workers' Compensation Act.

Instead of following the clear language of our Workers' Compensation Act and Human Rights Act as set forth above, the majority chose to look to other jurisdictions for

guidance. The majority's reliance on what other courts have done in these types of cases was misplaced. Our laws applicable to this issue are unique to this State, and there is simply no basis for comparison with the statutes of other states.

The decision by the majority in this case paves the way for human rights claims to be filed in every instance where an employee suffers an aggravation and/or progression of his or her prior workplace injury. These employees will always allege that their injuries were made worse by their employer's failure to accommodate their disability that resulted from their previous injury. The end result will be more double recoveries for claimants or possibly triple recoveries if a deliberate intention claim is also filed. Whether a claimant could get around the requirements of W.Va. Code § 23-4-2(d)(2)(ii)(C) remains to be seen.

Upon reflection, I believe my earlier statement that the majority was "chipping away" at the immunity conferred to employers by the Workers' Compensation Act was incorrect. Employers have actually lost a sizeable chunk of that immunity as a result of the majority's decision in this case, and I fear an avalanche of cases will now be filed. As I noted in my dissent to *Arnazi v. Quad/Graphics Inc.*, ___ W.Va. ___, ___ S.E.2d ___ (No. 31860, June 17, 2005), the West Virginia disability machine is still well-oiled and running smoothly. Perhaps the West Virginia slogan "almost heaven" should be changed to "claimants' paradise." For these reasons, I respectfully dissent.

