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

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Starcher, J., dissenting:

The majority's opinion is, without a doubt, the opinion I have most disagreed with in all my years on this Court. The opinion is a remarkable alignment of bad reasoning, bad policy and skewed legal research, topped off with a dose of faint-heartedness about the role of the courts in a three-branch constitutional government. I cannot begin to fathom or attempt to describe what may have motivated the majority's decision. I join Justice Albright's separate opinion, but I am impelled by the injustice of the majority's opinion to write separately and emphasize some of the many reasons why the majority's opinion is dead wrong.

I begin with the most obvious error: the majority opinion sets West Virginia's workers' compensation and common law on a course that is almost wholly different from that of every other state in the nation. Arthur and Lex Larsons' *Larson's Workers' Compensation Law* – the leading summary of the nationwide state of workers' compensation law since the 1950s – makes it clear that workers' compensation is a tit-for-tat, *quid pro quo* system: the employee gives up a common law cause of action only when it is replaced with a statutory workers' compensation remedy. If there is no *quid pro quo* within the workers' compensation system to counter a worker's loss of the right to sue, then states allow the

worker to proceed with a common law tort action. The majority opinion ignores the leading scholars on this issue, and charts a different course.

Professors Larson summarize the last century of workers' compensation law this way:

> The compensation remedy is exclusive of all other remedies by the employee . . . *if* the injury is within the coverage formula of the act. If it does not, as in the case where occupational diseases were deemed omitted because not within the concept of accidental injury, the compensation act does not disturb any existing remedy.[1]

The Larson treatise then goes into further detail on the *quid pro quo* nature of the law, emphasizing that a cause of action is not deemed taken away unless a comparable remedy is created by the workers' compensation act:

> If . . . the exclusiveness defense is a part of the *quid pro quo* by which the sacrifices and gains of employees and employers are to some extent put in balance, it ought logically to follow that the employer should be spared damage liability only when compensation liability has actually been provided in its place[.]
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> [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.[2]

Finally, the Larson treatise makes clear that if a mental injury is caused by an employer, and if that harm is not compensable under workers' compensation, the accepted

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[1]6 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, § 100.01 at 100-1 [2006] (emphasis added).

[2]*Id.*, § 100.04 at 100-23 (quotations and footnotes omitted).

rule nationwide is that the employee may pursue a common-law action against the employer for mental distress damages:

> An increasingly important category of work-related injuries supporting tort suits is that of nonphysical harms, in which compensation coverage fails because the essence of the harm is not physical injury. . . . Another category is that of mental injury claims in the handful of states that have severely limited or barred altogether the recovery of workers' compensation benefits for stress-related and other non-physical injuries.[3]

The argument of the leading scholars in this field can be summarized thusly: an exclusive remedy statute (like *W.Va. Code*, 23-2-6) bars an emotional distress cause of action only if the Legislature has provided a workers' compensation remedy. In the absence of a workers' compensation remedy, the worker may pursue a common-law cause of action.

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[3]*Id*. at 100-29. The treatise goes on to give the following dead-on-point example:

> The situation in Montana demonstrates what can happen when an activist legislature decides to eliminate recovery for these sorts of [purely mental-injury] claims. In one case [*Onstad v. Payless Shoesource*, 301 Mont. 259, 9 P.3d 38 (2000)], a Montana shoe clerk who suffered severe mental trauma following a sexual assault by an intruder at the shoe store was allowed to recover [compensable damages] . . . from her former employer due to its negligence in failing to maintain a safe work environment. . . .
>
> [The] state's supreme court reiterated that the Montana legislature had expressed its clear intent to exclude both "mental-mental" and "mental-physical" claims from compensability under the workers' compensation system. Since those sorts of claims were now outside the compensation bargain, they were clearly *inside* the domain of the tort world.

Id. at 100-29 to -30.

The majority opinion is directly contrary to these principles. The majority opinion sets West Virginia's common law on a course that is totally at odds with what courts are doing in just about every other jurisdiction in America. And the majority opinion is not only contrary to these principles, the opinion doesn't even mention their existence.

Let me turn, for a moment, to this Court's decision in 1933 in *Jones v. Rinehart & Dennis*, 113 W.Va. 414, 426, 168 S.E. 482, 487 (1933), and the majority opinion's manhandling of that seminal case. In that case, this Court held that if an injury was not covered by workers' compensation (in *Jones*, the injury was silicosis), then the injured worker could pursue a lawsuit for damages if the employer caused the injury by negligence. Compilations of cases on exclusive remedy statutes issued in 1936 and 1939 found that *Jones v. Rinehart & Dennis* was the majority rule, and was in harmony with the "great weight of authority."[4] Yet the majority opinion now finds – without citing *any* legal authority – that *Jones* was an aberration in American jurisprudence.

The majority opinion concludes that *Jones v. Rinehart & Dennis Co.* was "effectively annulled in 1945" when the Legislature amended the workers' compensation laws to make silicosis compensable, and the majority opinion just happened to be the first

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[4]*See* 100 A.L.R. 519 (1936), "Workmen's Compensation Act as exclusive of remedy by action against employer for injury or disease not compensable under act;" and 121 A.L.R. 1143 (1939), "Workmen's compensation act as exclusive of remedy by action against employer for injury or disease not compensable under act" ("In harmony with the great weight of authority as shown in the earlier annotation, it was held in the following later cases . . . that the workmen's compensation acts did not constitute an exclusive remedy so as to bar an action at common law, or under a statute, to recover for an injury or disease which was not compensable under the act.").

court in the seventy-three years since *Jones* was issued to recognize that annulment. This might be the greatest leap of jurisprudential logic I think I've ever encountered. Silicosis certainly became compensable in West Virginia after *Jones* was issued – but in 1935, not 1945, as the majority opinion claims.[5] But while silicosis was made compensable, many other injuries – such as black lung or asbestosis or hearing loss or emotional distress – were not compensable until many decades later. The reasoning of *Jones*, just like the reasoning of the courts in every other state in the union, was and is still valid: if an injury was excluded from coverage under the workers' compensation system, then a worker's right to pursue a common-law cause of action was preserved.

What the majority opinion truly holds is that this Court, and not the Legislature, is overruling *Jones v. Rinehart & Dennis*. The Court's reasoning in *Jones* in 1933 matches perfectly with the reasoning adopted by other courts in America; hence, the case had to be disposed of in some fashion to make way for the majority opinion's new rule of law. Rather

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[5]*See 1935 Acts of the Legislature*, Chapter 79 ("providing for compensation for disability, disablement or death resulting from silicosis, and defining silicosis"). As I discuss later, this 1935 enactment was a direct response to the industrial disaster that was the basis for *Jones v. Rinehart & Dennis*: the Hawk's Nest tunnel incident.

The Legislature further amended the workers' compensation act to cover occupational diseases in 1949, but continued to exclude from coverage gradually-contracted lung diseases such as coal worker's pneumoconiosis ("black lung") until after the November 1968 mine disaster in Farmington, West Virginia, a disaster which finally brought the plight of injured miners to the public eye. *See 1949 Acts of the Legislature*, Chapter 136 (adding coverage for "occupational diseases"); and *1969 Acts of the Legislature*, Chapter 152 (expanding the definition of "occupational disease" to include "occupational pneumoconiosis").

than being forthright, the majority opinion pinned the blame for the demise of *Jones* on the Legislature.

I was troubled to also find in the majority's opinion a rewriting of science and rewriting of history. The majority opinion suggests that the mental injury incurred by the plaintiff, Berchie Eugene Bias, was a mere trifle because it "occurr[ed] within a period of 90 minutes or so . . . when plaintiff was trapped in a smoky environment within a mine." The majority opinion then distinguishes Mr. Bias's injury from that of the plaintiff in *Jones v. Rinehart & Dennis*, because Mr. Bias's injury "was not at all similar to the slowly developing disease at issue in *Jones*."

First, modern medical science shows that traumatic stress disorders are, in fact, a physical injury. The shock of a terrifying event – like a rape, a robbery at gunpoint, or fearing death by suffocation when lost in the smoky darkness of a mine for ninety minutes – triggers chemical reactions in the brain that measurably scar and injure nerve tissue. The brain is actually, physically "re-wired" and injured. To somehow suggest that the injury to the plaintiff's brain is different from the lung injury that suffocated the decedent in *Jones* reflects a primitive, out-dated view of science.

The majority opinion reflects a disdain for the extreme fear of death that coal miners like Mr. Bias face on a daily basis – a fear that has become all-too-real this year – and the disabling effect that fear can have on a miner's psyche. So far, in 2006, at least thirty-three miners have died in America on the job, nineteen of them in West Virginia. In January, twelve miners died at the Sago mine after an explosion, eleven of them by suffocation

waiting for rescue. Less than three weeks later, two miners suffocated after a fire at the Aracoma Alma No. 1 Mine, when the miners became lost in the smoke. In May, three miners survived an explosion at the Darby Mine No. 1 in eastern Kentucky, only to die of carbon monoxide poisoning waiting in the smoke for rescue. It pains me to hear of these deaths, and then read the majority opinion's callous treatment of Mr. Bias's claims.[6]

Second, the majority opinion rewrites history because it *presumes* that the decedent in *Jones* suffered from a "slowly developing disease." The *Jones* opinion tells us only that the decedent died of silicosis caused by breathing dust that was "more than ninety-nine per centum silica" while digging an underground tunnel "near the village of Hawks Nest." 113 W.Va. at 415-16, 168 S.E. at 482-83. History, however, reveals that hundreds, perhaps over a thousand, immigrant and African American workers died digging the Hawks Nest Tunnel; no one knows the true figure because the tunnel contractor didn't bother to count, the bodies were often placed in mass graves, and records of the construction project were quickly destroyed. Workers left the tunnel covered head-to-toe in dust, and were so dust-covered they left dusty footprints as they walked. Workers could only work for a few

[6]I am reminded of the story of a man I knew who was the brother of a miner killed in the 1968 explosion of the mine in Farmington. This man was also a miner, a hard worker who rarely missed a day of work, and a solid member of the community. The day of the explosion he was scheduled to work, but did not work because he had to take his wife to a doctor. When he heard about the explosion, he ran to the mine, hoping to rescue his brother. After learning of his brother's death, the man became an emotional wreck and never worked another day in the mines. His marriage dissolved, his house fell into disrepair, and he ended up in bankruptcy. His emotional collapse could only be attributed to the mine explosion, even though he never suffered a single scratch.

days, a few weeks, maybe a few months, in the tunnel before they succumbed to the suffocating effects of the silica dust. Few workers were capable of staying on the job more than a year. History tells us, therefore, that the decedent in *Jones* very likely died from an injury that developed almost immediately from massive exposure to pure silica dust – and was not, and the majority opinion wishes, a "slowly developing disease." *See* Martin Cherniack, *The Hawk's Nest Incident: America's Worst Industrial Disaster* (1986).

What I find even more troubling is that the majority opinion construes our common law and statutes in a way to reach a wholly, completely unconstitutional result. The framers of the *West Virginia Constitution* provided citizens who have been wronged with rights to pursue a remedy for that wrong in the court system. Those rights can only be abrogated if something is given to the citizen in its place. *See W.Va. Constitution*, Art. III, § 17 ("The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law[.]")

The result in this case turns statutory construction on its head. Statutes are to be construed to reach a constitutional result, not the other way around. Syllabus Point 1, *State ex rel. Appalachian Power Co. v. Gainer*, 143 S.E.2d 351 (1965) ("Every reasonable construction must be resorted to by the courts in order to sustain constitutionality[.]") As this Court sagely stated in *Jones v. Rinehart & Dennis Co.*, 113 W.Va. at 426, 168 S.E. at 487:

> [T]he courts must administer the law as it is written, and must not undertake to make law. But where a court is confronted with two constructions – the first destructive of personal rights in that it takes away the means of effectuating such rights and of obtaining redress for their breach, and the other not destructive

> of either rights or remedies but harmonizing with basic conceptions of personal justice – the latter is preferred. This is interpreting law, not making it. The courts will not recognize that there is an open gap in the law where by reasonable interpretation such undesired condition can be avoided.

The interpretation given to our workers' compensation statutes by the majority opinion goes the opposite direction, and ends up abrogating a common law remedy and replacing it with nothing. The majority opinion does not harmonize the workers' compensation laws with basic conceptions of personal justice, but instead chooses to construe the laws to both eliminate personal, common law rights and eliminate any redress for their breach. In sum, the majority opinion construes the workers' compensation statutes in an unreasonable way so as to reach an unconstitutional result.

The majority opinion doesn't mention that its holding violates the constitutional rights of every West Virginia citizen. The majority, however, has a remarkable reason for avoiding the constitutional question: the lawyers representing the plaintiffs below never raised the constitution as a bar to the arguments made by the defendant below.

Let me make my statement clear. I am not saying the plaintiffs' lawyers were negligent; frankly, they probably thought, just like I did, that the law was clearly on their side and that no constitutional argument needed to be made.

What I am saying is that the majority of the members of this Court know the constitutional rights of West Virginia's citizens are being eviscerated – but they are willing to abdicate their role as defenders of the *Constitution* so long as nobody makes a public fuss. Each member of this Court was required, by law and by the *Constitution*, to take an oath to

support and defend the *Constitution* – yet the members of the majority now find themselves undermining the *Constitution* simply because no one pointed out that, perhaps, they shouldn't do that. Constitutional rights are being trampled because of a technicality.

This is not the first time this Court has ignored its duty to support and defend the *Constitution*. The United States Supreme Court recently vacated a criminal conviction that had been affirmed by three members of this Court because the Court had ignored a blatant violation of the *Constitution*. The U.S. Supreme Court remanded the case to this Court for reconsideration, and Justice Scalia candidly said it was a "tutelary remand, as a schoolboy made to do his homework again." *Youngblood v. West Virginia*, 547 U.S. ___, ___ (Dissenting Slip Op. at 4) (No. 05-6997, June 19, 2006) (Scalia, J. dissenting). Justice Scalia said that the U.S. Supreme Court's suggestion that it would be "better" for this Court to reconsider its decision to ignore the constitutional violation was "much as a mob enforcer might suggest that it would be 'better' to make protection payments." *Id*.

In conclusion, I am dismayed by the majority decision in this case. This Court is on a path to abdicate its role as the third branch in our constitutional government, and this case is another step on that path. For generations, courts have fostered and developed the common law, tempering the common law to meet modern day needs, and zealously protected the common law from legislative intrusion. As this case demonstrates, today, this Court is too often perfectly willing to cede control of the common law to the Legislature. I decline to join in the disintegration of the constitutional role of the courts as caretakers of the common law.

The Legislature has made it clear that employees who suffer purely emotional injuries at the hands of their employers on the job have no right to workers' compensation benefits. Now, the Court has chosen to dump those very same employees into a judicial purgatory with no remedy in the common law – when right, reasoning and the *Constitution* demand that those employees have a right to pursue an action in the courts.

I dissent.