

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 32778

BERCHIE EUGENE BIAS and PATRICIA CAROL BIAS,
Plaintiffs Below, Appellees

vs.

EASTERN ASSOCIATED COAL CORPORATION,
Defendant Below, Appellants

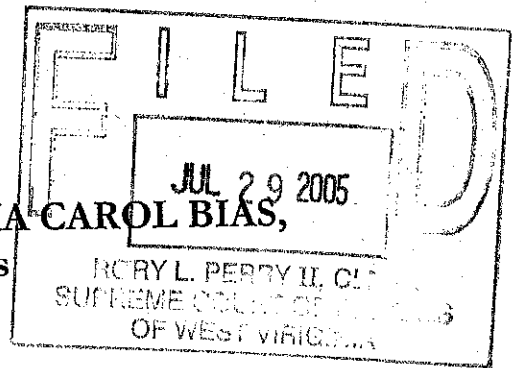
BRIEF IN SUPPORT OF CERTIFIED QUESTION

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I. INTRODUCTION

This is a certified question proceeding arising from an order the Circuit Court of Boone County entered on February 17, 2005, asking:

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 § 23-4-1(f), can maintain a common law negligence action against his employer, despite the immunity afforded by West Virginia Code § 23-2-6.

The Defendant, Eastern Associated Coal Corporation [Eastern], respectfully submits that the Circuit Court incorrectly answered this question in the affirmative, rendering a decision contrary to the legislature's clear intent that the workers' compensation system: (1) replace the common law tort system and provide the "exclusive remedy" for workplace illnesses and injuries and (2) provide employers immunity from common law suits by employees for workplace illnesses and injuries, whether mental or physical, suffered in the course of and resulting from their employment – including common law suits for negligent infliction of emotional distress such as the one at issue here.

Eastern's argument is very simple. The workers' compensation system supplanted the common law¹ tort system for workplace injuries. The workers' compensation system does not

¹Obviously, the workers' compensation system was not intended to supplant other statutory causes of action and remedies such as those under the Human Rights Act. *See, e.g.,* Syl. pt. 3, *Messer v. Huntington Anesthesia Group, Inc.*, No. 31739 (W. Va. July 7, 2005) ("The West Virginia Workers' Compensation Act, W. Va. Code § 23-2-1 et seq., is directed at compensating an employee who has suffered an injury or disease in the course of and resulting from his/her employment and at shielding the employer from liability outside the workers' compensation system for such injury. West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq. is directed towards actions of an employer in discriminating against an employee because of his or her disability and it would be inconsistent with the purposes of the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq., to limit its applicability to physical-injury disabilities unrelated to work.")

allow recovery for purely emotional distress claims. Thus, workers cannot avail themselves of the common law system for a type of injury, i.e., purely emotional distress claims, that the Legislature has exercised its plenary authority not to provide in the workers' compensation system.

There are a number of other remedies available under the common law tort system, such as for the loss of spousal, parental, and filial consortium, that are not available under the workers' compensation system. Their unavailability under the workers' compensation system does not translate into their availability under the common law tort system. Rather, they are merely attributes of the common law tort system that the Legislature has exercised its plenary authority not to incorporate into the workers' compensation system.

Under very limited circumstances, this Court has recognized an independent cause of action for negligent infliction of emotional distress. This attribute of the common law tort system, however, has not been incorporated into the workers' compensation system, which is the Legislature's prerogative. The practical effect of the Circuit Court's ruling in this case would be to expose West Virginia employers to a plethora of claims by employees who allege they suffer fear, anxiety, and stress as a result of various conditions of their employment. This is contrary, in Eastern's view, to the Legislature's intent.

II. STATEMENT OF FACTS

The facts pertinent to the certified question 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 down 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 that 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 that he was trapped in the smoke for approximately an hour and a half (1 1/2).

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.

In other words, even though he suffered no physical injury and returned to work the next day, the employee, Berchie Eugene Bias [Mr. Bias] and, his wife, Patricia Carol Bias [collectively the Biases] – only one day prior to expiration of the two-year statute of limitations – filed suit against Eastern, alleging liability under the deliberate intent statute, W. Va. Code § 23-4-2(b), and common law negligence because he became frightened when the mine temporarily filled with smoke. Under the deliberate intent statute, however, an employee may not maintain a “deliberate intent” claim unless the predicate facts would also support a workers’ compensation claim. See *Messer v. Huntington Anesthesia Grp., Inc.*, No. 31739 (W. Va. July 7, 2005) (Maynard, J., dissenting) (noting that a claimant who prevails on a deliberate intent cause of action receives a double recovery).² Conceding that they could not successfully prosecute a deliberate intent claim, the Biases then filed a motion seeking a ruling that they could maintain a cause of action against Eastern for common law negligence. Eastern opposed this motion, asserting the “exclusive remedy” and “immunity” provisions of the workers’ compensation statute.

²This is because the “deliberate intent” cause of action is an exception to the immunity provisions of the workers’ compensation statute, which provides that the benefits provided thereunder are otherwise the exclusive remedy for work-related injuries. See W. Va. Code § 23-4-2(d)(1) (“It is declared that . . . that the 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; that, in enacting the immunity provisions of this chapter, the Legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct . . .”). See also *Bell v. Vecellio & Grogan, Inc.*, 197 W. Va. 138, 143-44, 475 S.E.2d 138, 143-44 (1996) (noting that a deliberate intent cause of action under West Virginia Code § 23-4-2(c) is a “statutory direct cause of action by an employee against an employer expressed within the workers’ compensation system.”). Because W. Va. Code § 23-4-1f 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 Circuit Court properly ruled that Mr. Bias could maintain no cause of action for “deliberate intent.”

On January 12, 2004, a hearing was conducted on the Biases' motion, at which time the Circuit Court decided to certify the question to this Court. Eastern's counsel tendered a timely certification order to the Biases' counsel, but on January 12, 2005, the Biases moved to have the Circuit Court reconsider its decision to certify the question of the viability of such cause of action to this Court. On February 17, 2005, however, the Circuit Court entered a certification order, ruling that employees may sue their employers despite the immunity provisions of the workers' compensation statute. This ruling, however, is contrary to legislative intent and would open the floodgates to employee stress-related claims. Consequently, Eastern seeks reversal of the Circuit Court's ruling.

III. DISCUSSION OF LAW

A. THE STANDARD OF REVIEW IS *DE NOVO* AS INTERPRETATION OF THE IMMUNITY PROVISIONS OF THE WORKERS' COMPENSATION STATUTE AT ISSUE.

This case involves a certified question on the proper interpretation of the immunity provisions of the workers' compensation statute. "This Court employs a plenary standard of review when [it] answer[s] certified questions. "The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." *Ferrell v. Nationwide Mut. Ins. Co.*, No. 32050, slip op. at 5 (July 8, 2005) (quoting Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996)). Further, this case involves interpretation of the Workers' Compensation statute and this Court's review of the Circuit Court's decision in this context is likewise *de novo*. See *Conley v. Workers' Compensation Div.*, 199 W. Va. 196, 199, 483 S.E.2d 542, 545 (1997) ("Where the issue on an appeal is clearly a question of law or involving an interpretation

of a statute, we apply a *de novo* standard of review.”).

B. THE WORKERS' COMPENSATION SYSTEM, SUBJECT TO CERTAIN STATUTORY EXCEPTIONS, PROVIDES THE "EXCLUSIVE REMEDY" FOR WORKPLACE ILLNESSES AND INJURIES AND "IMMUNITY" FOR EMPLOYERS FOR ANY COMMON LAW CLAIMS BY EMPLOYEES FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

In ruling that an employee can maintain a negligent infliction of emotional distress claim against the employer despite statutory immunity, the Circuit Court reasoned, unsupported by any authority, that because an employee is precluded from receiving workers' benefits for emotional distress absent physical injury, the immunity provisions of the workers' compensation statute do not apply. This reasoning is flawed. The Legislature plainly intended that, subject to limited statutory exceptions, the workers' compensation system: (1) comprehensively replace the common law system for compensating workplace injuries and illnesses; (2) immunize employers from any common law causes of action for workplace injuries and illnesses; and (3) eliminate any employee's cause of action – whether under the workers' compensation statute or common law – for negligent infliction of emotional distress. This Court has acknowledged that negligent infliction of emotional distress claims are inherently subject to abuse. Without any physical injury or physical manifestation of distress, an employee can claim that virtually anything, demanding customers, contentious coworkers, aggressive sales targets, mechanical problems, or a workplace fire or other event, caused the employee such emotional distress as to warrant a cause of action. After this Court expanded workers' compensation protection to include so-called “mental/mental” claims, the Legislature acted to abolish such claims. It was not the Legislature's intent to allow employees to file civil actions asserting such claims; rather, it was

the Legislature's intent to protect employers from the potential liability that such questionable causes of action would impose.

1. The Legislature Clearly Intended that West Virginia Employers Are Completely Immune from Any Cause of Action by Any Employee for Common Law Negligence as a Result of Any Injuries Suffered During the Course and Scope of Employment.

The entire history of the workers' compensation system undermines the contention that any common law causes of action survive, including a cause of action for negligent infliction of emotional distress because, as this Court has noted, the workers' compensation system was intended to replace and completely supplant the common law system that preceded it.

"Prior to 1913, employees injured as a result of and in the course of their employment enjoyed the right to seek recompense for their occupational injuries by prosecuting a private cause of action for damages directly against their employers." *State ex rel. ACF Industries, Inc. v. Vieweg*, 204 W. Va. 525, 537, 514 S.E.2d 176, 188 (1999). However, "[w]ith the enactment of the West Virginia Code of 1913 came the establishment of a statutory system of workers' compensation whereby employees' private remedies were replaced with a state-administered scheme of distinct, and frequently predetermined, compensation benefits." *Id.*, 514 S.E.2d at 188. As *ACF Industries* made clear, "As a result of this legislative action, the source of an employee's remedies for a work-related injury changed from judicial constructions of common law tort doctrines to specifically enumerated statutory rights." *Id.*, 514 S.E.2d at 188. In other words, "[t]he right to workmen's compensation benefits is wholly statutory. Under the workmen's compensation statutes of this state, a claimant has a right to receive benefits and the

director of workmen's compensation is authorized to pay benefits to a claimant in no greater amount than is expressly authorized by statute." *Id.*, 514 S.E.2d at 188. "It has been a mainstay of Anglo-American jurisprudence that the common law gives way to a specific statute that is inconsistent with it; when a statute is designed as a revision of a whole body of law applicable to a given subject, it supersedes the common law." *Bell v. Vecellio & Grogan, Inc., supra* at 143, 475 S.E.2d at 143 (emphasis supplied) (quoting *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995) (citing William N. Eskridge, Jr. & Phillip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of the Public Policy* 690 (1988)). Mr. Bias can have no common law cause of action for negligent infliction of emotional distress because no common law remedies³ survived enactment of the statutory workers' compensation system.

This Court has repeatedly held that as to employers (other than subject to the enumerated statutory exceptions), the workers' compensation system, is the "exclusive remedy" for employees who suffer injuries during the course and scope of employment under W. Va. Code § 23-2-6. "The essence of the exclusivity of the Workers' Compensation Act for work-related injuries is found at W. Va. Code §23-2-6 (2003), which provides that an employer 'is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring.'" *Messer v. Huntington Anesthesia Grp., Inc., supra* at 8. "W. Va. Code § 23-2-6 (2003) and the expression of legislative intent in W. Va. Code § 23-4-2(d)(1) (2003) provide employers with an expansive immunity from liability outside the workers' compensation system for workplace injuries of employees." *Id.* at 11 (footnote omitted). While "exceptions to this

³Eastern concedes, however, that statutory remedies, such as those under the Human Rights Act, would be viable.

immunity are set forth specifically and implicitly in the Workers' Compensation Act, . . . the Legislature has been extremely restrictive in creating such exceptions." *Id.* at 11-12. *See also Roberts v. Consolidation Coal Co.*, 208 W. Va. 218, 234, 539 S.E.2d 478, 494 (2000) ("It has been held repeatedly by this Court that the right to workmen's compensation benefits is based wholly on statutes, in no sense based on the common law; that such statutes are *sui generis* and controlling; that the rights, remedies and procedures thereby provided are exclusive [.]") (quoting *Bounds v. State Workmen's Compensation Comm'r*, 153 W. Va. 670, 675, 172 S.E.2d 379, 382-83 (emphasis supplied and citations omitted); *State ex rel. Frazier v. Hrko*, 203 W. Va. 652, 659 n.11, 510 S.E.2d 486, 493 n.11 (1998) ("This statute is also known as the 'exclusivity' provision, as it makes workers' compensation benefits the exclusive remedy for personal injuries sustained by an employee injured in the course of and resulting from his or her covered employment.") (emphasis supplied); *Wisman v. William J. Rhodes and Shamblin Stone, Inc.*, 191 W. Va. 542, 447 S.E.2d 5 (1994) ("Because of the provisions for employer and coemployee immunity contained in W. Va. Code §§ 23-2-6 and 6a (1994), workers' compensation is the exclusive remedy available to an injured employee, and an uninsured or underinsured motorist carrier has no liability.") (emphasis supplied). "The effect of this exclusivity is, by statute, far-reaching." *Messer*, No. 31739, slip op. at 10. The "exclusive remedy" and "immunity" provisions of the workers' compensation statute clearly evidence a legislative intent that no common law cause of action may be maintained by an employee against his or her employer for workplace injuries or illnesses. Thus, the Circuit Court was simply wrong in ruling that the Biases could

maintain their common law cause of action for negligent infliction of emotional distress against Eastern.

As previously noted, W. Va. Code § 23-2-6 provides, “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 . . .” (emphasis added). As Eastern subscribed to the workers’ compensation fund at the time of the subject incident, the immunity statute plainly provides that Eastern is “not liable to respond in damages at common law or by statute for the injury or death of any employee”— including Mr. Bias and his common law claim for negligent infliction of emotional distress.

This Court has expressly recognized the constitutionality of the statutory immunity provided to West Virginia employers for suits by their employees arising from injuries suffered during the course and scope of employment. Syl. pt. 5, *Miller v. Monongahela Power Co.*, 184 W. Va. 663, 403 S.E.2d 406 (1991). The scope of the immunity provided is all-inclusive:

As this Court succinctly stated in *State ex rel. Frazier v. Hrko*, 203 W. Va. 652, 510 S.E.2d 486 (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].” 203 W. Va. at 659, 510 S.E.2d at 493. Footnote eleven of *Frazier* explained: “This statute is also known as the ‘exclusivity’ provision, as it makes workers’ compensation benefits the exclusive remedy for personal injuries sustained by an employee injured in the course of and resulting from his or her covered employment.” *Id.* at 659 n. 11, 510 S.E.2d at 493 n. 11.

The immunity provided by § 23-2-6 is not easily forfeited. As the District Court for the Southern District of West Virginia explained in *Smith v. Monsanto Co.*, 822 F. Supp. 327 (S.D. W. Va.1992), “[u]nder the Act, an employer who is otherwise entitled to immunity under § 23-2-6 may lose 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, or (2) by deliberately intending to produce injury or death to the employee.” 822 F. Supp. at 330 (citation omitted).

State ex rel. Abraham Lincoln Corp. v. Bedell, 216 W. Va. 99, 104, 602 S.E.2d 542, 547 (2004) (per curiam) (emphasis added). As Eastern had not defaulted in its workers’ compensation payments (nor did the Biases have a cause of action for “deliberate intent” under the Workers’ Compensation Act), Eastern was—and is—immune from all common law causes of action, including a cause of action for negligent infliction of emotional distress.

The Circuit Court’s error is in equating compensability with exclusivity. Exclusivity, however, is not a function of compensability. “In determining whether a Workers’ Compensation Act provides an employee with an exclusive remedy for workplace injuries, thereby precluding a common law cause of action, a court must only ascertain whether the situation is covered by the Act; compensability is irrelevant.” *Hall v. Synalloy Corp.*, 540 F. Supp. 263, 273 (S.D. Ga. 1982)(emphasis supplied). “The issue . . . is whether the Act’s exclusive remedy provision bars [the] action and not whether [the] injuries are compensable under the Act. The analysis of these issues is not the same because an injury may not be compensable under the Act yet be considered to be within its ‘purview’ so as to bar related claims.” *Lewis v. Northside Hospital, Inc.*, 599 S.E.2d 267, 269 (Ga. Ct. App. 2004)(emphasis supplied). “[E]mployees are not entitled to redress in tort for every injury either that is not compensable

or for which compensation is inadequate under the act.” *DeOliveira v. Liberty Mut. Ins. Co.*, 870 A.2d 1066, 1071 (Conn. 2005). If an injury occurs in the course of and resulting from the employment, the claim inescapably falls within the exclusivity of the Act, *see Sydenstricker v. Unipunch Products, Inc.*, 169 W. Va. 440, 288 S.E.2d 511 (1982) (“We have traditionally held that the immunity statute in our Workmen’s Compensation Act insulates the employer against liability for damages arising out of injuries or death occasioned by industrial accidents.”); *see also State ex rel. Frazier v. Hrko*, *supra* at 659, 510 S.E.2d at 493 (“When 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].”)(emphasis added); *Persinger v. Peabody Coal Co.*, 196 W. Va. 707, 713, 474 S.E.2d 887, 893 (1996) (“It is clear that worker’s compensation is the exclusive remedy when an employee is negligently injured in the workplace.”);⁴ even if not compensable. *See Livitsanos v. Superior Court*, 828 P.2d 1195, 1197 (Cal. 1992) (“[C]laims for intentional or negligent infliction of emotional distress are preempted by the exclusivity provisions of the workers’ compensation law, notwithstanding the absence of any compensable physical disability.”); *DeOliveira*, *supra* at 1072 (“[T]he mere fact that an injury is not compensable under the act does not mean necessarily that an action for damages may be brought and that the exclusivity provision does not bar such an action.”); *Zaytzeff v. Safety-Kleen*

⁴Not only do the immunity provisions of the workers’ compensation statute protect employers from common law suits by their employees, they preclude actions by third parties arising from employee work-related injuries. *See* Syl. pt. 6, *Sydenstricker*, *supra* (“Where the right of contribution is initially grounded in common liability in tort, courts have held that a joint tortfeasor employer is immune from a third-party contribution suit because he is initially immune from tort liability to his injured employee by virtue of the workmen’s compensation statutory bar of such tort actions.”).

Corp., 473 S.E.2d 565, 567 (Ga. Ct. App. 1996) (“That an injury is not compensable under the Act does not necessarily mean it is not within the purview of the Act for purposes of the exclusivity provisions.”).⁵

“[I]n determining whether a cause of action is barred by the exclusivity provision, the appropriate question is whether the act is applicable to the injury at issue[.]” *DeOliveira*, 870 A.2d at 1072 (2005), which is itself a question of legislative intent. *Id.* In *Messer*, No. 31739, slip op. at 15-16 n.6, the Court observed that W. Va. Code § 23-4-1f was a response to the Court’s decision in *Breeden v. Workmen’s Compensation Commissioner*, 168 W. Va. 573, 285 S.E.2d 398 (1981), which first recognized a “mental/mental” injury under the Workers’ Compensation Act. While dicta in *Messer* could be read to exclude mental/mental claims from the exclusivity provision of the Workers’ Compensation Act, such a reading is inconsistent with the Court’s recognition in *Messer* that W. Va. Code § 23-4-1f was a reaction by the legislature to the Court’s decision in *Breeden*.

The plain language of W. Va. Code § 24-4-1f demonstrates that the Legislature intended that mental/mental claims in the course of and arising from employment fall within the Workers’ Compensation Act, but that such claims would nevertheless not be compensable. W. Va. Code § 23-4-1f provides “[f]or the purposes of this chapter, no alleged injury or disease shall

⁵ See generally *Livitsanos*, 828 P.2d at 1202 (quoting *Williams v. State Comp. Ins. Fund*, 123 Cal. Rptr. 812, 815 (Ct. App. 1975) (citing 2 *Larson on Workmen’s Compensation* § 65.20)) (““Decisions in other states hold that the workers’ compensation law provides the exclusive remedy for industrial injury even though the resulting disability—for example, sexual impotence—is noncompensable.”); *Gallipo v. City of Rutland*, 789 A.2d 942, 948 (Vt. 2001) (noting that “courts have held that a [workers’ compensation act] exclusivity statute applies if the injury is covered by the WCA, but no compensation is payable because the items of alleged damage are not compensable.”).

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." Thus, injuries in the course of and arising from the employment, that is, injuries falling within "the purposes of this chapter," are not a "compensable injury."

Injuries for negligent infliction of emotional distress in the course of and arising from the employment are injuries falling within the scope of the Act, but which the Legislature acting pursuant to its plenary power over both the common law and the Workers' Compensation Act, have made nonactionable. Moreover, it would be an incongruous reading of legislative intent to find that the Legislature enacted a statute to protect employer's from mental/mental claims under the Workers' Compensation Act, but to then find that the Legislature left intact the right of the employee to sue the employer for the exact same injury in circuit court. Such a paradoxical result was rejected by the Supreme Judicial Court of Massachusetts in a case legally similar to the one here.

In *Green v. Wyman-Gordon Co.*, 664 N.E.2d 808 (Mass. 1996), a plaintiff sued her employer alleging, *inter alia*, that sexual harassment directed at her by a co-worker constituted the negligent infliction of emotional distress. The plaintiff attempted to avoid exclusivity by claiming that a recently enacted statute amending the workers' compensation act excluding from the definition of injury "mental or emotional disability arising principally out of a bona fide personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm," *id.* at 813 n.11 (quoting Mass. Gen. L. Ann. ch. 152, § 1(7A)), meant that the negligent infliction claim fell outside the exclusivity provision and was

amenable to a common law claim. *Id.* at 813. As with our Legislature's reversal of the result in *Breedem*, the court observed that "[t]he intent of the amendment was to reverse the result in *Kelly's Case*, 394 Mass. 684, 477 N.E.2d 582 (1985), where [the court] permitted an employee to recover for emotional distress associated with a threatened layoff and transfer." *Id.* at 814. It then rejected the plaintiff's argument,

The plaintiff purports to turn this intention on its head, presuming that the Legislature, in cutting off an avenue of recovery for employees under the workers' compensation act, intended to open up a previously closed common law route. We see no reason to attribute such paradoxical intentions to the Legislature, especially where the result would "negate the intended purpose of the Workers' Compensation Act to provide a uniform, statutory remedy for injured workers, in contrast to a piecemeal, tort-based system."

Green, 664 N.E.2d at 814 (citation omitted). "[I]t would strain credulity and commonsense to presume that the Legislature chose to limit employers' collective liability under the workers' compensation scheme, only to expose individual employers to greater liability in common law negligence suits" *Id.* It is unreasonable "to eliminate [negligent infliction of emotional distress] as a workers' claim but to allow such a claim through another door as a common law action." *Catalano v. First Essex Sav. Bank*, 639 N.E.2d 1113, 1116 (Mass. Ct. App. 1994) (citation omitted) (dicta). The same result should obtain in West Virginia.

Messer did not confront the issue presented by this case and its discussion of W. Va. Code § 23-4-1f is dicta. *Messer*, slip op. at 15. "Now that the issue is squarely presented, it behooves [this Court] to reconcile the plain language of the statutes with [its] prior *holdings*." *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598, 605 (2001).

Such reconciliation requires this Court to conclude that by the terms and intent of the exclusivity⁶ and non-mental/mental statutes⁷ and the Court's consistent adherence to the plain language and meaning of the statutes affording employers immunity that W. Va. Code §§ 23-6-2 and 24-4-1f⁸ any negligent infliction of emotional distress claims in the course of and arising from the employment is barred.⁹ The Circuit Court was simply wrong to recognize a common law cause of action where the Legislature both generally, and specifically for mental/mental claims, prescribed common law relief for injuries and illnesses falling within the Workers' Compensation Act. "Merely because the . . . appellant's claims for 'psychological problems'

⁶W. Va. Code § 23-4-6 ("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).

⁷W. Va. Code § 23-4-1f ("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.").

⁸*State ex rel. Abraham Linc. Corp. v. Bedell, supra* at 104, 602 S.E.2d at (per curiam) (quoting *State ex rel. Frazier v. Hrko*, 203 W. Va. 652, 659, 510 S.E.2d 486, 493 (1998) (quoting *W. Va. Code*, 23-2-6 [1991])) (emphasis added) ("[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."); *id.* at 104, 602 S.E.2d at 547 (quoting *State ex rel. Frazier v. Hrko*, 203 W. Va. 652, 659 n.11, 510 S.E.2d 486, 493 n.11 (1998) (the "exclusivity" provision, . . . makes workers' compensation benefits the exclusive remedy for personal injuries sustained by an employee injured in the course of and resulting from his or her covered employment.")). *Accord Erie Ins. Property and Cas. Co. v. Stage Show Pizza*, 210 W. Va. 63, 69 n.5, 553 S.E.2d 257, 263 n.5 (2001) (emphasis added).

⁹The fact that the Legislature has so clearly spoken as to the elimination of mental/mental claims eliminates application any *Jones v. Rinehart & Dennis Co.*, 113 W. Va. 414, 168 S.E.2d 482 (1933). *See Ball v. Joy Mfg. Co.*, 755 F. Supp. 344, 354-55 (S.D. W. Va. 1990).

were not compensable does not insulate such claims from exclusivity provisions of the act.”

Zaytzeff v. Safety-Kleen Corp., *supra* at 569.

2. **The Legislature Properly Exercised Its Plenary Authority to Exclude Benefits for Negligent Infliction of Emotional Distress from the Workers’ Compensation System.**

Obviously, the entire workers’ compensation system is about tradeoffs – employees lose certain rights, such as the right to have their damages fixed by a jury, and in exchange obtain certain benefits, such as immunity from claims by co-employees or the defense of comparative fault. The benefits the workers’ compensation system provides were never intended to duplicate the damages that an employee might receive in a common law action; rather, they are intended to balance the relative ease of their procurement against the financial burden on employers. “In exchange for the right to recover scheduled compensation without proof of negligence on the part of the employer in those cases in which a right of recovery is granted, the employee forgoes other rights and remedies which he might otherwise have had, but if he accepts the terms of the Act he as well as the employer is limited to those things for which the Act makes provision.”

Nowell v. Stone Mountain Scenic R. R., 257 S.E.2d 344, 345 (Ga. Ct. App. 1979). As this Court observed in *State ex rel. Boan v. Richardson*, 198 W. Va. 545, 482 S.E.2d 162 (1996):

Permanent total disability awarded under workers’ compensation is part of a comprehensive plan designed to rectify the results of an injury in the workplace. The payments to the claimants and other benefits are in lieu of such elements of damage in the common law tort system as lost wages, lost earning capacity, reimbursement of past and future medical expenses, past and present pain and suffering, emotional distress, and other factors. W. Va. Code §§ 23-2-6 and 23-4-6 (1994 & Supp. 1996); *Belcher v. J.H. Fletcher & Co.*, 498 F. Supp. 629, 630 (S.D. W. Va.1980)

("[T]he right of the injured employee to workmen's compensation has been substituted in lieu of his cause of action against the negligent employer and this remedy of compensation is an exclusive remedy.") citing *Makarenko v. Scott*, 132 W. Va. 430, 55 S.E.2d 88 (1949), *overruled on other grounds*, *Jones v. Laird Foundation, Inc.*, 156 W. Va. 479, 195 S.E.2d 821 (1973), and *Thornton v. Charleston Area Medical Center*, 158 W. Va. 504, 213 S.E.2d 102 (1975). The amount of permanent total disability benefits is determined under a statutory scheme that involves diverse factors, including the nature of the injury, the average wages of the claimant over a relatively short time, and the average wages earned in the State. See W. Va. Code § 23-4-6 (Supp. 1996).

(emphasis added). Moreover, as this Court recently reiterated in Syllabus Point 4 of *State ex rel. Bierne v. Smith*, 214 W. Va. 771, 591 S.E.2d 329 (2003), "The ultimate responsibility for the fiscal health of the West Virginia Workers' Compensation system rests with the Legislature. Balancing the conflicting goals of minimizing premiums while providing full and fair compensation to injured workers is the exclusive province of our publicly elected legislators, and is not to be invaded by the Commissioner, or the Courts.' Syl. pt. 3, *Repass v. Workers' Compensation Division*, 212 W. Va. 86, 569 S.E.2d 162 (2002)." Yet, in the instant case, the Circuit Court has invaded the Legislature's exclusive province by validating a cause of action that the Legislature expressly excluded from compensability under the workers' compensation system.

Obviously, it is the Legislature's prerogative to determine the scope of benefits to be provided under the workers' compensation system. This Court has expressly acknowledged that the Legislature's decision to include or exclude certain elements of damages within the statutory workers' compensation system is plenary. See *Boyd v. Merritt*, 177 W. Va. 472, 474, 354 S.E.2d 106, 108 (1986) ("The right to workers' compensation benefits is wholly a creature of statute."); *Lester v. State Workmen's Comp. Comm'r*, 161 W. Va. 299, 315, 242 S.E.2d 443, 452 (1978) ("[T]he

legislature has the power to modify this state's industrial insurance program as it sees fit so long as no constitutional provision is infringed"); *Ferguson v. State Workmen's Comp. Comm'r*, 152 W. Va. 366, 371, 163 S.E.2d 465, 468 (1968), *overruled on other grounds by Martin v. Workers' Comp. Div.*, 210 W. Va. 270, 557 S.E.2d 324 (2001) ("Alleged rights and remedies, not provided by the workmen's compensation statutes, can not be recognized or granted by the courts.") (emphasis supplied); *see also Wampler Foods, Inc. v. Workers' Compensation Division*, 216 W. Va. 129, 144, 602 S.E.2d 805, 820 (2004) ("Our law is therefore clear that the Legislature may determine the extent and applicability of claims under the workers' compensation statutory scheme and may change the pre-existing state of the law in the furtherance of its legislative powers—unless some other legal or constitutional bar otherwise limits the exercise of its discretion."). *Cf. Makarenko v. Scott*, 132 W. Va. 430, 450, 55 S.E.2d 88, 98 (1949) ("If under existing workmen's compensation schedules a final award in a given case is actually, though not legally, inadequate, the relief in increasing the maximum amounts and percentages, fixed and limited by the statute, must come from the Legislature and not from the courts. The power to classify disabilities and specify rates of compensation and to limit them by schedules is legislative, not judicial."), *overruled on other grounds by Jones v. Laird, Inc.*, 156 W. Va. 479, 195 S.E.2d 821 (1973) and *Thornton v. Charleston Area Med. Ctr.*, 158 W. Va. 504, 213 S.E.2d 102 (1975).

W. Va. Code § 23-4-1f, which was enacted in 1993, before the subject accident involved in this case, 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.¹⁰ It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this chapter.”(emphasis supplied) (footnote added).¹¹ It was enacted in response to this Court’s decision in *Breeden v. Workmen’s Compensation Comm’r*, *supra*, in which this Court held in Syllabus Point 2 that, “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.)” As this Court discussed in *Marlin v. Bill Rich Const., Inc.*, 198 W. Va. 635, 650, 482 S.E.2d 620, 635 (1996), “[i]n 1993, the West Virginia Legislature rejected the compensability of mental-mental claims when it added W. Va. Code § 23-4-1f to the workers’ compensation statute.” (footnote omitted). “[T]he possibility of a lack of remedy in a few cases does not abrogate workers’ compensation exclusivity. Not every aggravation in normal

¹⁰In the instant case, it is undisputed that Mr. Bias suffered no physical injury; rather, his claim is solely one for negligent infliction of emotional distress, which is a “mental/mental” claim under the workers’ compensation statute.

¹¹West Virginia is certainly not the only state to exclude claims for negligent infliction of emotional distress without physical injury. *See generally* 2 *Larson’s Workers’ Compensation: Desk Edition* § 56.04[5] (2005) (noting that Alabama, California, Kentucky, Idaho, Florida, Oklahoma, and Wyoming allow no relief for mental/mental claims). On the other hand, some states do permit a cause of action for negligent infliction of emotional distress under certain circumstances, but such cause of action has produced a number of problems. *See* Emmanuel S. Tipon, *Right to Workers’ Compensation for Emotional Distress or Like Injury Suffered by Claimant as Result of Nonsudden Stimuli—Compensability Under Particular Circumstances*, 108 A.L.R.5th 1, 1 (2005)(“The number of emotional distress claims being made as a result of mental stimulus unaccompanied by physical injury continues to rise. Their compensability under workers’ compensation laws has likewise continued to be a very controversial issue among the courts.”); Emmanuel S. Tipon, *Right to Workers’ Compensation for Emotional Distress or Like Injury Suffered by Claimant as Result of Sudden Stimuli Involving Nonpersonnel Actions—Compensability Under Particular Circumstances*, 84 A.L.R.5th 249, 249 (2005)(“There is no unanimity among the states on whether employees suffering from emotional distress as a result of emotional stimuli occurring in the workplace should be given workers’ compensation benefits.”).

employment life is compensable.” *Levitsanos, supra* at 1203 (footnote omitted). As this Court has acknowledged,¹² there is no claim for workers’ compensation benefits arising from an employer’s alleged negligent infliction of emotional distress.

3. Because the Workers’ Compensation System Supplants the Common Law System, Because the Legislature Has the Plenary Authority to Place Limitations on the Compensability of Claims Under the Workers’ Compensation System, and Because a Claim for Negligent Infliction of Emotional Distress is a Common Law Claim, an Employee Has No Common Law Cause of Action Against an Employer for Negligent Infliction of Emotional Distress.

As previously noted, the workers’ compensation system supplants the common law system with respect to the claims of injured employees against their employers and co-employees. Because of its exclusively statutory nature, the Legislature is entitled to place limitations on the compensability of workers’ compensation claims, including its decision not to make compensable claims for negligent infliction of emotional distress or so-called “mental/mental” claims. As the cause of action for negligent infliction of emotional distress is a common law claim and the remedies of the workers’ compensation system are exclusive, Mr. Bias has no right to prosecute a claim that the Legislature has decided not to make compensable. Otherwise, any employee could negate legislative intent merely by suing rather than filing a workers’ compensation claim.

¹²See also *Roberts, supra* at 234, 539 S.E.2d at 494 (“A review of the body of workers’ compensation statutes indicates that there appear to exist few preclusions to an employee’s recovery of benefits. . . . Likewise, such work-related injury must be a compensable occupational injury or disease. See, e.g., . . . W. Va. Code § 23-4-1f (1993)(Repl. Vol. 1998)(precluding recovery for ‘mental-mental claims’) . . .”).

Under the West Virginia Constitution, the Legislature has the power to modify the common law, including placing limitations on both common law and statutory causes of action. See *Verba v. Ghaphery*, 210 W. Va. 30, 35, 552 S.E.2d 406, 411 (2001) (“It is beyond dispute that the legislature has the power to alter, amend, change, repudiate, or abrogate the common law.”); *Mildred L.M. v. John O.F.*, 192 W. Va. 345, 350 n.5, 452 S.E.2d 436, 441 n.5 (1994) (“Unquestionably, the legislature may establish and even change judicially adopted burdens of proof.”). In *Roberts, supra* at 234, 539 S.E.2d at 494. this Court noted that there are a number of statutes that place limits on the benefits recoverable under the workers’ compensation system:

A review of the body of workers’ compensation statutes indicates that there appear to exist few preclusions to an employee’s recovery of benefits. Primarily, an employee’s claim must come within the rubric of an occupational injury or disease to entitle him/her to an award of workers’ compensation benefits. See W. Va. Code § 23-4-1 (1989)(Repl. Vol. 1998)(directing workers’ compensation commissioner to make disbursements “to the employees of employers subject to this chapter, which employees have received personal injuries in the course of and resulting from their covered employment or to the dependents, if any, of such employees in case death has ensued”). Likewise, such work-related injury must be a compensable occupational injury or disease. See, e.g., W. Va. Code § 23-4-1e(b)(1993)(Repl. Vol. 1998)(exempting from compensable claims injuries or diseases sustained by an incarcerated individual “in the course of and resulting from his or her work during such period of incarceration which work is imposed by the administration of the penitentiary or jail”); W. Va. Code § 23-4-1f (1993)(Repl. Vol. 1998) (precluding recovery for “mental-mental claims”); W. Va. Code § 23-4-9b (1986)(Repl. Vol. 1998) (excluding from compensability preexisting “definitely ascertainable impairment resulting from an occupational or a nonoccupational injury, disease, or any other cause, whether or not disabling”).

See also State ex rel. Bierne, supra at 776, 591 S.E.2d at 334 (“Although the result of the Legislature’s decision to cut off benefits at age 65 will be to further impoverish some of our poorest citizens, it is within the prerogative of the Legislature to limit these benefits in its efforts to preserve the fund for future claims.”); *Roberts, supra* at 234-45, 539 S.E.2d at 494-95 (self-inflicted injury is non-compensable).¹³

To accept the Biases’ reasoning, however, would be to hold that (1) because a prisoner’s claim for work-related illnesses or injuries would be non-compensable, a prisoner could maintain a cause of action against the prison for such illnesses or injuries; (2) because an employee’s claim for a pre-existing illnesses or injuries would be non-compensable, an employee could maintain a cause of action against his or her employer for such illnesses and injuries; (3) because an employee’s permanent, total disability benefits terminate at age 65, an employee could maintain a cause of action against his or her employer for damages arising from a workplace illness or injury suffered after the age of 65; and (4) because an employee’s workplace suicide may be non-compensable, an employee’s dependents could maintain a cause of action for against his or her employer. Clearly, this is not what the Legislature intended when it chose to exclude certain claims from workers’ compensation compensability.

¹³*But see* Syl. pt. 1, *Hall v. State Workmen’s Compensation Comm’r*, 172 W. Va. 87, 303 S.E.2d 726 (1983) (“An employee’s suicide which arises in the course of and results from covered employment is compensable under W. Va. Code, 23-4-1 [1974], provided, (1) the employee sustained an injury which itself arose in the course of and resulted from covered employment, and (2) without that injury the employee would not have developed a mental disorder of such degree as to impair the employee’s normal and rational judgment, and (3) without that mental disorder the employee would not have committed suicide.”).

It bears repeating that the workers' compensation system supplants the common law system and the Legislature is entitled to place whatever limitations it desires on the types of claims that are compensable. W. Va. Code § 23-4-2(c)(1) cannot be more plain: "It is declared that enactment of this chapter and the establishment of the workers' compensation system in this chapter was and is intended to remove from the common law tort system all disputes between or among employers and employees regarding the compensation to be received for injury or death to an employee except as expressly provided in this chapter" (emphasis supplied). The cause of action for negligent infliction of emotional distress is a common law construct. *See Marlin, supra* at 650, 482 S.E.2d at 635 ("COMMON LAW EMOTIONAL DISTRESS CLAIMS").

Certainly, should this Court recognize such workplace cause of action, a real Pandora's box may be opened as there are endless possibilities for workplace events to produce allegedly serious emotional injuries. For example emotional distress claims arising from non-personnel actions have been raised in, discussed, by or applied in cases involving:

- An argument or confrontation with co-workers
- An argument or confrontation with supervisors or employers
- An argument or confrontation with other persons beside co-workers or supervisors
- A confrontation with armed persons
- A delayed rescue
- A dismissal demand

- Destruction of the workplace
- Discharge of a firearm
- Disclosure of private or secret information
- Disorderly workplace conduct
- Electrical power outage
- Having to enter a boiler
- Fear of being killed
- Fear of being sued
- Fear of losing pension benefits
- Fear of losing workers' compensation benefits
- Fear of working in emergency conditions
- Fires in the workplace
- A sudden and unexpected greeting
- A gun battle
- The taking of a hostage
- Near involvement in a workplace accident
- Being lost in the workplace
- Practical jokes or horseplay
- The presence of vermin in the workplace
- Being the victim of a robbery
- Being a witness to a robbery

- Seeing a dead body
- Learning about a person's death
- Observing a person being injured
- Shooting a person
- Threats by co-employees
- Performing a rescue or attempted rescue

See Emmanuel S. Tipon, *Right to Workers' Compensation for Emotional Distress or Like Injury Suffered by Claimant as Result of Sudden Stimuli Involving Nonpersonnel Actions – Compensability Under Particular Circumstances*, *supra* at § 2[a]. (footnote omitted) (citations internal omitted). It is for this reason that the Legislature decided to exclude negligent infliction of emotional distress claims from compensability under the workers' compensation system.

Many other courts have held that employee common law claims for intentional or negligent infliction of emotional distress are barred by the exclusivity provisions of state workers' compensation statutes. In *Joyner v. School District of Philadelphia*, 313 F. Supp.2d 495, 503-04 (E.D. Pa. 2004), a teacher sued a school district for negligent infliction of emotional distress arising from an allegedly false accusation that she assaulted a student, stating as follows, "The PWCA provides the exclusive remedy for all employees' work-related injuries. . . . In her complaint, Plaintiff does not allege that Defendants' actions were personal in nature. Nor does she allege that any of the defendants and Plaintiff had a relationship outside of the workplace. Moreover, all of the conduct at issue occurred in the work context and was directly related to workplace issues. . . . [Therefore], the PWCA preempts Plaintiff's emotional distress claims.

Accordingly, the Court grants Defendants' Motion to Dismiss these claims." [Footnotes omitted]. See also *Eddy v. Virgin Islands Water and Power Authority*, 369 F.3d 227 (3rd Cir. 2004)(claim of emotional distress resulting from injuries sustained in following supervisor's direction to perform unsafe maintenance work was barred by exclusive remedy provision of Virgin Islands Workers' Compensation Act); *Stallings v. Walmart, Inc.*, 2004 WL 2914044 (9th Cir.)(employee's negligent infliction of emotional distress claim arising out of his discharge was barred by Hawaii's workers' compensation system); *Hancuff v. Prism Technologies and Assemblies, LLC*, 357 F. Supp.2d 828 (W.D. Pa. 2005)(exclusivity provision of the Pennsylvania Workmen's Compensation Act (PWCA) bars claims for intentional and/or negligent infliction of emotional distress arising out of an employment relationship); *Frank v. L.L. Bean, Inc.*, 352 F. Supp.2d 8 (D. Me. 2005) (Maine Workers' Compensation Act exempted employer from liability for common law torts of intentional infliction of emotional distress and negligent infliction of emotional distress relating to employee's alleged sexual harassment by supervisor on company premises); *Quebecor World Book Services, LLC*, 315 F. Supp.2d 136 (D. Mass. 2004)(exclusivity provisions of Massachusetts Workers' Compensation Act (MWCA) barred employee's claim for negligent infliction of emotional distress); *McPherson v. City of Waukegan*, No. 01-C-9164, 2003 WL 21267095 (N.D. Ill.) (exclusive remedy provision of Illinois Workers' Compensation Act barred former city employee's claim seeking to hold city liable, under theory of respondeat superior, for supervisor's battery or intentional infliction of emotional distress), *aff'd*, 379 F.3d 430 (7th Cir. 2004); *Calero v. Unisys Corp.*, 271 F. Supp.2d 1172 (N.D. Cal. 2003)(claims for emotional distress caused by employer's conduct causing distress such as discharge, demotion, discipline or

criticism are preempted by California Workers' Compensation Act); *Pickett v. Colonel of Spearfish*, 209 F. Supp. 2d 999 (D. S.D. 2001)(South Dakota Workers' Compensation Act was exclusive remedy for female employee's claims of negligent retention, negligent supervision, battery, and intentional infliction of emotional distress); *Calkins v. Dollarland, Inc.*, 117 F. Supp. 2d 421 (D. N.J. 2000)(employee's claim against employer for negligent infliction of emotional distress was barred by exclusivity provision of worker's compensation statute); *Richardson v. Valley Asphalt, Inc.*, 109 F. Supp. 2d 1332 (D. Utah 2000)(employees' claims against employer for negligent infliction of emotional distress are barred by exclusive remedy provision of Workers' Compensation Act); *Hardebeck v. Warner-Jenkinson Co., Inc.*, 108 F. Supp.2d 1062 (E.D. Mo. 2000)(Missouri Workers' Compensation Act barred employee's claim against her employer for intentional and negligent infliction of emotional distress); *McClain v. Pactiv Corp.*, 360 S.C. 480, 602 S.E.2d 87 (2004)(employee's claim of intentional infliction of emotional distress against his former employer and employer's director of occupational health alleging that former employer, fellow employees, and law enforcement conspired with each other to have him arrested and involuntarily committed after speaking in favor of a union was barred by exclusivity provision of Workers' Compensation Act); *Karch v. BayBank FSB*, 794 A.2d 763 (N.H. 2002)(employee's claims against employer and employer's vice president for negligent infliction of emotional distress, relating to employer's and vice president's alleged use of employee's personal, non-work-related telephone conversation, were precluded by the exclusive-remedy provision of the workers' compensation statute generally barring any claim based upon negligence by an employer or co-employee for personal injuries arising out of or in the course of employment);

Shamrock Coal Co., Inc. v. Maricle, 5 S.W.3d 130 (Ky. 1999)(assertion that coal company engaged in conduct which was extreme and outrageous and intentionally or recklessly caused severe emotional distress to coal workers was insufficient to allow workers to maintain a civil cause of action under the intentional act exception of the exclusivity provision of the Workers' Compensation Act); *Lavalley v. Inservices, Inc. v. Aguilera*, 837 So. 2d 464 (Fla. Ct. App. 2002)(Workers' Compensation Act's exclusivity provision barred claimant's intentional infliction of emotional distress claim); *Labbe v. Chemical Waste Management, Inc.*, 786 So. 2d 868 (La. Ct. App. 2001)(employer's alleged regulatory violations at its chemical waste disposal site, allegedly causing former employee to fear for his safety, was not extreme and outrageous conduct, as would support intentional infliction of emotional distress claim, and thus employee's exclusive remedy for alleged injury was provided by workers' compensation law); *Helland v. Kurtis A. Froedtert Memorial Lutheran Hosp.*, 601 N.W.2d 318 (Wis. Ct. App. 1999)("exclusive remedy" provision of Workers' Compensation Act barred any recovery in at-will employee's wrongful discharge action for intentional infliction of emotional distress in the termination of her employment). While these out of jurisdiction cases "are, of course, not of controlling force or effect or binding in authority upon this Court[,] [t]hey are . . . entitled to great respect and should be regarded as persuasive authority." *Burless v. West Virginia Univ. Hosp., Inc.* 215 W. Va. 765, 774 n.9, 601 S.E.2d 85, 94 n.9 (2004) (quoting *Edlis, Inc. v. Miller*, 132 W. Va. 147, 167, 51 S.E.2d 132, 141-42 (1948)). Eastern respectfully submits that this Court should rule in concordance with all of these jurisdictions that a claim for negligent infliction of emotional distress is barred by the exclusivity provisions of the West Virginia workers' compensation statute.

4. **Even at Common Law, this Court Has Not Recognized a Separate and Independent Cause of Action Under These Circumstances.**

“As a general rule,” this Court noted in *Johnson v. West Virginia University Hospitals, Inc.*, 186 W. Va. 648, 651, 413 S.E.2d 889, 892 (1991), “absent physical injury, there is no allowable recovery for negligent infliction of emotional distress. PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 361 (W. Keeton 5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 436A (1965).” Such has been the law in West Virginia for decades: “There can be no recovery in tort for an emotional and mental trouble alone without ascertainable physical injuries arising therefrom, . . . through the simple negligence of the defendant[.]” Syl., in part, *Monteleone v. Co-Operative Transit Co.*, 128 W. Va. 340, 36 S.E.2d 475 (1945). Although there are exceptions to this general rule, those exceptions have been narrowly drawn by this Court.

The Biases’ separate and independent claim of negligent infliction of emotional distress without physical injury arising from Mr. Bias’ fright at being exposed to smoke in a confined area would be unprecedented in West Virginia. Where, as in the instant case, no physical injury is present, this Court has previously limited the viability of claims of negligent infliction of emotional distress to (1) the “dead body” exception;¹⁴ (2) the “witnessing the death or serious bodily injury of a close personal relative exception;¹⁵ and (3) the “fear of disease” exception.¹⁶

¹⁴*Ricottilli v. Summersville Memorial Hospital*, 188 W. Va. 674, 425 S.E.2d 629 (1992); 22 Am. Jur. 2d *Dead Bodies* § 118 (2004).

¹⁵*Jones v. Sanger*, 204 W. Va. 333, 512 S.E.2d 590 (1998); *Stump v. Ashland, Inc.*, 201 W. Va. 541, 499 S.E.2d 41 (1997); *Heldreth v. Marrs*, 188 W. Va. 481, 425 S.E.2d 157 (1992).

¹⁶*Marlin, supra.*

This Court has not recognized that fright alone, produced by another's negligent act, without any physical injury, can support a separate and independent cause of action¹⁷ for negligent infliction of emotional distress. *See Johnson, supra; Monteleone, supra.* Thus, even were this Court to determine that an employee can maintain, under certain circumstances, a separate and independent claim for negligent infliction of emotional distress despite the exclusivity and non-mental/mental provisions of the Workers' Compensation Act, these are not such circumstances.

IV. CONCLUSION

"This Court must accede," it recently acknowledged, "to the methodology established by the legislature and the rules and regulations designed to determine an employer's continuing entitlement to workers' compensation coverage, immunities, and defenses." *State ex rel. Abraham Lincoln Corp., supra* at 105, 602 S.E.2d at 549; *see also State ex rel. Bierne, supra* at 775, 591 S.E.2d at 333 ("[W]e must acknowledge that our workers' compensation scheme is a creature of statute, created by and at the mercy of the Legislature."). Pursuant to a specific grant of authority in the West Virginia Constitution, the Legislature has abolished all common law remedies, including any remedy for negligent infliction of emotional distress, in favor of a statutory workers' compensation system. It has determined that there can be no recover by employees for emotional illnesses or injuries allegedly suffered during the course and scope of employment. It would constitute nothing less than a violation of the separation of powers for this Court, in the face of such a clear articulation of legislative intent, to allow employees who are precluded

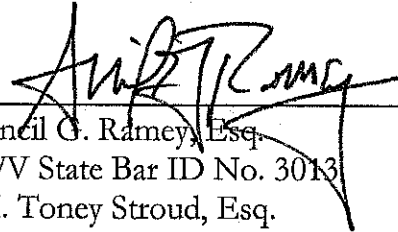
¹⁷Of course, emotional distress damages which are attendant to the commission of a separate tort are recoverable. *See, e.g., Rodriguez v. Consolidation Coal Co.*, 206 W. Va. 317, 524 S.E.2d 672 (1999)(wrongful termination); *Bramer v. Dotson*, 190 W. Va. 200, 437 S.E.2d 773 (1993)(medical malpractice).

from bringing any common law claims for workplace injuries or illnesses to bring common law claims for negligent infliction of emotional distress. Finally, to recognize a separate and independent cause of action for negligent infliction of emotional distress, under these circumstances, is unprecedented in West Virginia, and Eastern submits is unwise, as it will expose West Virginia employers to uncertain and potentially devastating liability.

WHEREFORE, the Petitioner, Eastern Associated Coal Corporation, respectfully requests that this Court answer the certified question in the negative and reverse the decision of the Circuit Court of Boone County.

**EASTERN ASSOCIATED COAL
CORPORATION**

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CERTIFICATE OF SERVICE

I, Ancil G. Ramey, do hereby certify that on July 28, 2005, I served the foregoing "BRIEF IN SUPPORT OF CERTIFIED QUESTION" upon all counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Norman W. White, Esq.
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A handwritten signature in black ink, appearing to read "Ancil G. Ramey". The signature is stylized and written over a horizontal line.