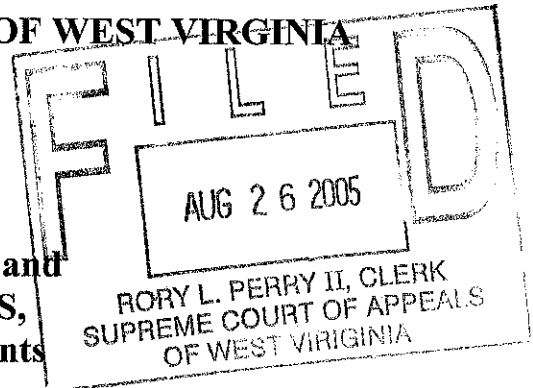


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

No. 32778

**BERCHIE EUGENE BIAS and  
PATRICIA CAROL BIAS,  
Plaintiffs Below, Respondents**



vs.

**EASTERN ASSOCIATED COAL CORPORATION,  
Defendant Below, Petitioner**

**RESPONDENT'S BRIEF IN SUPPORT OF CERTIFIED QUESTION**

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	STATEMENT OF FACTS .....	1
III.	DISCUSSION OF LAW .....	5
	A. THE COURT SHOULD APPLY THE <i>DE NOVO</i> STANDARD OF REVIEW IN ANSWERING THE CERTIFIED QUESTION AT ISSUE .....	5
	B. RESPONDENT CAN MAINTAIN A COMMON LAW NEGLIGENCE ACTION AGAINST HIS EMPLOYER BECAUSE IMMUNITY FROM SUIT DOES NOT APPLY WHEN AN EMPLOYEE, SUCH AS RESPONDENT, SUFFERS A NON-COMPENSABLE WORK RELATED INJURY CAUSED BY HIS NEGLIGENT EMPLOYER.....	5
	1. West Virginia Workers' Compensation Immunity From Suit Does Not Apply When An Employee Suffers a Non-Compensable Work Related Injury Caused By the Employers' Negligent Acts .....	5
	2. Respondent Can Maintain a Common Law Cause of Action Against His Negligent Employer Because His Work Related Injury Was Specifically Excluded From Compensability by the West Virginia Legislature .....	11
	C. PRECLUDING RESPONDENT FROM MAINTAINING A CAUSE OF ACTION AGAINST HIS EMPLOYER FOR NEGLIGENTLY CAUSING HIS NON-COMPENSABLE INJURIES WOULD LEAVE RESPONDENT WITHOUT A REMEDY AND WOULD VIOLATE THE RULES OF STATUTORY CONSTRUCTION .....	14
IV.	CONCLUSION.....	16

## TABLE OF AUTHORITIES

### CASES

<i>Baldwin v. Butcher</i> , 184 S.E.2d 428 (W. Va. 1971).....	15
<i>Ball v. Joy Manufacturing Co.</i> , 755 F.Supp. 1344 (S.D. W. Va. 1990).....	8, 9, 11-12
<i>Bilchak v. State Workmen's Compensation Com'r</i> , 172 S.E.2d 698 (W. Va. 1969).....	5
<i>Farley v. Sartin</i> , 466 S.E.2d 522 (W. Va. 1995).....	15
<i>Gallapoo v. Wal-Mart Stores, Inc.</i> , 475 S.E.2d 172 (W. Va. 1996).....	5
<i>Harless v. First Nat. Bank in Fairmont</i> , 289 S.E.2d 692 (W. Va. 1982).....	13
<i>Jones v. Rinehart &amp; Dennis Co.</i> , 168 S.E. 482 (W. Va. 1933).....	7-9, 11-15
<i>Keplinger v. Virginia Elec. and Power</i> , 537 S.E.2d 632 (W. Va. 2000).....	5
<i>Martino v. Barnett</i> , 595 S.E.2d 65 (W. Va. 2004).....	5

### STATUTES

W. Va. Code § 23-2-6 .....	6-8, 11
W. Va. Code § 23-4-1 .....	5, 7, 9
W. Va. Code § 23-4-1f.....	6, 11-12

W. Va. Code § 23-4-1e ..... 6

W. Va. Code § 23-4-2 ..... 9

W. Va. Code § 23-4-2(b)..... 6, 14

**OTHER SOURCES**

2 LARSON’S WORKERS’ COMPENSATION: DESK EDITION § 65.10..... 9-10

*Annotation, Workmen’s Compensation Act as Exclusive Remedy by Action Against Employer for Injury or Disease Not Compensable Under Act,*  
100 A.L.R. 519 and 121 A.L.R. 1143 (1939), WL 121 A.L.R. 1143  
(Cummulative Supplement, June 2004) ..... 15

## I. INTRODUCTION

Respondents, Berchie Eugene Bias and Patricia Carol Bias, his wife, hereby submit their Brief concerning the following question of law certified to this Court by the Circuit Court of Boone County:

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.

Respondents submit that the Circuit Court correctly answered this question in the affirmative because the immunity afforded to employers by the West Virginia Workers' Compensation Act is only enjoyed when an employee suffers a compensable injury not otherwise excluded by the Act, whether or not his employer was negligent. Moreover, not allowing an employee to maintain a common law suit against his employer for non-compensable purely emotional injuries would leave injured workers without any remedy whatsoever. As a result, Respondents respectfully request that this Court answer the above question in the affirmative and affirm the decision of the Circuit Court of Boone County and allow the Respondent to maintain his common law negligence action against his employer because of established caselaw interpreting the statutory language in favor of the Respondents herein.

## II. STATEMENT OF FACTS

Respondents do not agree with the Petitioner's rendition of the procedural facts surrounding this certified question. However, the following facts, as stated in the Circuit Court's February 17, 2005 certification order, are not in dispute:

This action arises as a 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 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 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 he was trapped in the smoke for approximately an hour and a half (1 ½).

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.

Because of the continuing severity of his emotional injuries, Respondent brought suit against his employer alleging liability under the deliberate intent exception to the West Virginia Workers' Compensation Act as outlined in W. Va. Code §§ 23-4-2(b) and 23-4-2(c)(ii), and also

stated a cause of action for intentional and negligent infliction of emotional distress due to the fact that the defendant intentionally short circuited the slip switch, thereby causing the smoke that trapped the Respondent in the mine.<sup>1</sup> Contrary to defendant's assertion, no action was ever taken by Respondents or the Circuit Court concerning the deliberate intent claim. However, in an effort to clarify the issues and efficiently litigate the civil action, Respondents filed a motion with the Circuit Court seeking a ruling as to whether they could maintain a common law negligence cause of action against the defendant. In this Motion, Respondent argued that Mr. Bias' injuries, although caused by the defendant's negligence, were not compensable because of the specific exclusion of mental-mental injuries from the scope of Workers' Compensation coverage outlined in W. Va. Code § 23-4-1f. Respondent further argued that because his injuries were not compensable, that the exclusivity provisions of the Worker's Compensation Act did not apply and that he could maintain a negligence cause of action against his employer for his emotional injuries.

On January 12, 2004, a hearing was held on Respondents' motion, at which time the Circuit Court ruled that plaintiffs could maintain a common law negligence action against the defendant, but also decided to certify the question to this Honorable Court. Nearly a year after this ruling, plaintiffs moved the Circuit Court to reconsider its ruling due to several attempts by the defendant to delay the certification process.<sup>2</sup> On February 17, 2005, the Circuit Court

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<sup>1</sup> In defendant's Response to Plaintiff's Request for Admission Numbers 5 and 8, Eastern admitted that on or before September 18, 1999, the slip switch in question, along with other slip switches throughout the mine, had been intentionally short circuited for "troubleshooting purposes". The Defendant further admitted that it received a citation from the United States Department of Labor, Mine Safety and Health Administration as a result of its actions. See Defendant's Response to Plaintiff's Request for Admission Number 7.

<sup>2</sup> Although not paramount to the issue at hand, it is interesting to note that at the January 12, 2004 hearing, the Circuit Court ordered the defendant to prepare the necessary documents to certify the question to this Court and submit those documents to the plaintiffs for review and

entered its certification order, ruling that because Mr. Bias' mental injuries are not compensable injuries, they are not part of the West Virginia Workers' Compensation system, and because they are not part of the system, the exclusivity rule does not apply and no immunity exists for the defendant employer from a common law suit for damages for these emotional injuries. Respondents submit that this is not an issue of first impression in this State. Cases decided by this Court prior to the enactment of § 23-4-1f have held that the statutory framework of the West Virginia Workers' Compensation Act only grants immunity to employers for work related injuries caused by the employers' negligent actions that are not otherwise compensable under the Workers' Compensation Act. Further, if this Court were to accept Petitioner's position and reverse its prior holdings, an employee who suffers a mental injury without physical manifestation at the hands of his employer would be left with no remedy at law to redress the damages caused by the negligence of his employer. Such a decision would be contrary to the spirit of common law principles, interpretation of statutory construction and the legislative intent of the West Virginia Worker's Compensation Act.

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comment. After several phone calls by plaintiffs' counsel to determine the status of the documents, counsel for defendant sent a proposed certification order on May 12, 2004. Plaintiffs' counsel reviewed the order, made changes and left a telephonic voice message with defense counsel inviting discussion of the proposed changes, but received no response. However, on May 13, 2004, Eastern Associated Coal Corporation filed suit against the plaintiff in the United States District Court for the Southern District of West Virginia, alleging that the disputes contained in plaintiffs' complaint filed in the Circuit Court of Boone County were subject to the mandatory arbitration provisions contained in the January 1, 1998 version of the National Coal Bituminous Wage Agreement and asked the District Court to dismiss the Boone County action. During the pendency of the District Court action, plaintiffs' counsel made several attempts to contact defense counsel by telephone and e-mail regarding the certified question, but was unsuccessful. Due to an adverse ruling in a similar case, Eastern dismissed the District Court action and plaintiffs subsequently filed their Motion to Reconsider with the Circuit Court because of defendant's delay and lack of cooperation concerning the certified question. The certification order was later tendered to the Court by the parties in February, 2005.

### III. DISCUSSION OF LAW

#### A. THE COURT SHOULD APPLY THE *DE NOVO* STANDARD OF REVIEW IN ANSWERING THE CERTIFIED QUESTION AT ISSUE.

Because this case involves the review of a certified question, Respondents agree with Petitioner that the standard of review the Court should employ is *de novo*. “The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.” *Martino v. Barnett*, 595 S.E.2d 65, 68 (W. Va. 2004) (quoting Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 475 S.E.2d 172 (W. Va. 1996) and Syl. Pt. 2, *Keplinger v. Virginia Elec. and Power Co.*, 537 S.E.2d 632 (W. Va. 2000)).

#### B. RESPONDENT CAN MAINTAIN A COMMON LAW NEGLIGENCE ACTION AGAINST HIS EMPLOYER BECAUSE IMMUNITY FROM SUIT DOES NOT APPLY WHEN AN EMPLOYEE, SUCH AS RESPONDENT, SUFFERS A NON-COMPENSABLE WORK RELATED INJURY CAUSED BY HIS NEGLIGENT EMPLOYER.

##### 1. West Virginia Workers' Compensation Immunity From Suit Does Not Apply When An Employee Suffers a Non-Compensable Work Related Injury Caused By the Employers' Negligent Acts.

In 1913, the West Virginia Workers' Compensation system was established to compensate injured workers for injuries suffered in the course of and arising out of his/her employment, irregardless of fault. *See W. Va. Code* § 23-4-1 (2004). The system maintains its no-fault nature by requiring West Virginia employers to pay premiums into the fund. The amount of these premiums is based on certain criteria such as the number of workers and other factors. These funds are then used to compensate injured workers whose injuries fall within the coverage of the Act. *See Bilchak v. State Workmen's Compensation Com'r*, 172 S.E.2d 698 (W.

Va. 1969). In exchange for assuming new liability without fault, the employer is afforded immunity from suits for injuries that fall within the purview of the Workers' Compensation system and are not otherwise specifically excepted.<sup>3</sup> See *W. Va. Code* § 23-2-6 (2004). The "exclusivity provision", as it has become known, of § 23-2-6 reads as follows:

Any employer subject to this chapter who shall subscribe and pay into the workers' compensation fund the premiums provided by this chapter or who shall elect to make direct payments of compensation as herein provided shall not be 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 such employer shall not be in default in the payment of such premiums or direct payments and shall have complied fully with all other provisions of this chapter.

Petitioner has presented a misguided argument that this "exclusivity provision" bars any work related suit by an injured employee against his employer except "deliberate intent" causes of actions, whether or not the resultant injuries or diseases are compensable under the Act.

The term "injury", although not defined in § 23-2-6, is later qualified and defined throughout the act as meaning a compensable physical injury. For instance, § 23-4-1f specifically defines "injury" as a compensable physical injury and further excludes any mental injury without physical manifestation. More specifically, the statute states that "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." *W. Va. Code* § 23-4-1f. Other parts of the Act qualify and define various other injuries and diseases that are not compensable. See *W. Va. Code* § 23-4-1 (defining certain diseases as compensable) and § 23-4-1e (denying compensability for injuries incurred while incarcerated). Reading these sections

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<sup>3</sup> Also originally enacted in 1913, *W. Va. Code* § 23-4-2(b) provides an employee with a right of action outside the Workers' Compensation system whose injury or death results from the deliberate intention of his or her employer to produce such injury or death.

together with § 23-2-6, it is clear that injuries for which an employer is provided immunity from suit are limited to workplace injuries that are compensable under the Act.

The question of whether an employee who suffers a non-compensable injury can maintain a common law negligence action against his negligent employer was addressed by this Court in *Jones v. Rinehart & Dennis Co.*, 168 S.E. 482 (W. Va. 1933). Prior to the recognition of certain occupational diseases as compensable injuries under the Act, the plaintiff's deceased husband in *Jones* contracted silicosis while constructing an underground tunnel for the New Kanawha Power Company while under the employment of Rinehart & Dennis Company, Inc. He later died as a result of the disease. *Id.* at 483.<sup>4</sup> Plaintiff brought suit against her husband's employer, alleging that it was negligent in allowing large quantities of silica dust to pervade and saturate the tunnel during construction, thereby causing plaintiff's decedent's fatal disease. *Id.* Plaintiff further argued that despite the immunity provided by § 23-2-6, the defendant employer, a subscriber to the fund, not in default of premiums, was nevertheless liable for her husband's wrongful death because his disease was not compensable under the Act. Plaintiff further argued that the Act only exonerates negligent employers from common law liability in compensable matters. *Id.* at 484. The defendant argued, just as the Petitioner has in the case at bar, that despite whether an injury or disease is compensable or not, § 23-2-6 relieves subscribing employers, not in default, from liability for the injured employee's damages. *Id.*

In deciding the issue, this Court examined the immunity provisions contained in § 23-2-6. The Court determined that those immunity provisions must be read in conjunction with § 23-4-1,

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<sup>4</sup> Since the *Jones* decision, § 23-4-1 was amended to recognize a wider range of occupational diseases and today would likely encompass the disease contracted by plaintiff's decedent in *Jones*. See *W. Va. Code* § 23-4-1 (2005), as amended.

the section containing the definition of compensable injury, because the two sections are interrelated. More specifically, this Court stated:

The language of section 2516 [§ 23-2-6] providing that an employer subject to the compensation act, not in default, 'shall not be liable to respond in damages at common law or by statute for the injury or death of any employee however occurring,' if considered isolated from the remainder of said section and from all the rest of the act, would sustain the contention of the defendants that an action for damages by an employee against an employer for injury arising from the employment may not be maintained even though such injury or disability is not compensable. But the meaning of that clause must not be determined from its cold phraseology alone. Consideration must be given to the background and purpose of compensation acts, to the evils sought to be corrected and the objects to be attained; to the rules of the common law with relation to right of action for industrial injuries and diseases, both occupational and otherwise; to the legislative history of our own act; and to all portions of the act which may be of assistance in determining legislative intent with respect to said phraseology of section 2516 [§ 23-2-6].

*Jones*, 168 S.E. 482 at 484 (emphasis added). After finding that plaintiff's decedent's disease was not compensable under the Act, the Court held that while employers were exempted from liability for compensable injuries or the death of an employee, employers were not immune from liability for a non-compensable injury, disease or death caused by the negligence of the employer, despite the fact that the employer was in compliance with the provisions of the Act. *Id.* at 487.

The *Jones* case was most recently interpreted by the United States District Court in the Southern District of West Virginia in the case of *Ball v. Joy Manufacturing Co.*, 755 F.Supp. 1344 (S.D. W. Va. 1990). In *Ball*, a group of workers brought suit against their employer for emotional distress and the costs of medical monitoring due to exposure to PCB's throughout the course of their employment. *Id.* at 1346-48. The District Court, applying West Virginia law,

including the West Virginia Workers' Compensation Act, held that mere exposure to PCB's without some definite injury is not a compensable injury under § 23-4-1. *Id.* at 1355-57.

Plaintiffs argued that since their injuries were not compensable, the Act was not a bar to a common law suit for damages. Plaintiffs maintained that they should be able to recover their damages in a *Mandolidis*-type suit outside the confines of the Workers' Compensation Act. *Id.* at 1353. Much like the Petitioner in the case at bar, the defendants argued that Workers' Compensation benefits were the exclusive remedy for the workers and a separate civil action could only be maintained if the plaintiffs' injuries were caused by the "deliberate intent" of the employer. *Id.*

The Court determined the issue by closely examining *Jones*. The Court then applied *Jones* and held that because the plaintiffs' injuries were not compensable under the West Virginia Workers' Compensation statute, plaintiffs could maintain their common law cause of action against their employer. The District Court further held that plaintiffs would not be required to meet the elements of deliberate intent contained in § 23-4-2 because the injuries giving rise to the action were outside the confines of the West Virginia Workers' Compensation system:

The Court, therefore, finds that an exposure to toxic chemicals is not a compensable 'injury' under the Workers' Compensation Statute. Such Statute is therefore not a bar to the Occupational Plaintiffs bringing a civil action for damages based on such an exposure. Additionally, because such Statute is not applicable, they need not satisfy the deliberate intent standard which is required under the Statute to bring a *Mandolidis*-type action, rather they may bring an ordinary, independent common law action for damages.

*Ball*, 755 F. Supp., at 1357 (emphasis added). Moreover, Professor Arthur Larson, one of the most recognized authorities on Workers' Compensation, also opines that employer immunity

from suit for work related injuries should only be enjoyed when the injured employee sustains an injury for which he is compensated for by the Workers' Compensation system.

Once a workers' compensation act has become applicable . . . it affords the exclusive remedy for the injury by the employee or dependents against the employer and insurance carrier. This is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for while the employer assumes a new liability without fault, it is relieved of the prospect of large damage verdicts.

If this is the justification for the exclusive remedy rule, it ought logically to follow that the employer should be spared damages 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.

2 *Larson's Workers' Compensation* § 65.10. Therefore, as a result of the foregoing, Petitioner's argument that employer immunity extends to compensable and non-compensable injuries is wholly without merit. Furthermore, Petitioner's laundry list of cases and argument that most jurisdictions support immunity for non-compensable injuries caused by the negligence of the employer is an attempt to misguide the reader due to the fact that statutes from other jurisdictions are not the same as the West Virginia statute, thereby making those cases and argument irrelevant. West Virginia clearly recognizes the right of a plaintiff to bring a common law negligence action against his employer for injuries caused by that employer's negligence that are not compensable under the West Virginia Workers' Compensation system. It is also clear that recognition of such private right of action is not a new or novel theory, but is one that is accepted by prominent scholars throughout the nation, as well as many other jurisdictions.

**2. Respondent Can Maintain a Common Law Cause of Action Against His Negligent Employer Because His Work Related Injury Was Specifically Excluded From Compensability by the West Virginia Legislature.**

Although *Jones* and its progeny were decided before the enactment of West Virginia Code § 23-4-1f, those decisions nevertheless are dispositive on the issue of whether the Respondent can maintain a common law action against his employer for negligently causing his work related injury. West Virginia Code § 23-4-1f was enacted by the Legislature in 1993 to specifically exclude purely mental work related injuries caused by nonphysical means from compensability under the West Virginia Workers' Compensation system. See *W. Va. Code* § 23-4-1f (1993). As stated above, Mr. Bias, the Respondent in the case at bar, suffered a purely mental injury as a result of being trapped in the mine by smoke that resulted from the Petitioner intentionally and/or negligently short circuiting a slip switch in the mine that subsequently caused a belt fire. Under the language of § 23-4-1f "mental-mental" injuries of this sort are not compensable under the West Virginia Act.

Applying the logic and reasoning of *Jones* and *Ball* to the case at bar, the result achieved in this case is the same as in the prior cases. As in those cases, the only question to be answered in the case at bar is whether or not Respondent's injuries are compensable under our workers' compensation statute. See *Jones*, 168 S.E. at 486 and *Ball*, 755 F. Supp. at 1354. If the injury is compensable, Petitioner is clearly afforded the immunity provided by the Act in § 23-2-6. If the workplace injury is not compensable, then Respondent can maintain a common law cause of action against his employer for negligently causing his work related injuries despite the immunity provided by § 23-2-6. The fact that § 23-4-1f was enacted prior to those cases is irrelevant. §23-4-1f merely further defines the term "injury" in the context of the Act and answers the question of compensability posed by the *Jones* line of cases. Because Respondent's

injury was ruled non-compensable by the Legislature, there is no question that he can maintain a common law cause of action against his employer for negligently causing his injuries.

In its brief, Petitioner contends that allowing the Respondent to maintain a cause of action against his employer for negligently causing his work related injury would cause a flood of litigation by injured workers. For example, Petitioner states that if Respondent's reasoning is accepted then an employee's non-compensable pre-existing illness or injury would be actionable. However, Petitioner's argument is fatally flawed due to the fact that in order for an injured worker to maintain a cause of action against their employer for a non-compensable work related injury, such injury must be caused by the negligence of the employer. Therefore, Petitioner's example fails because the employer presumptively would not have caused an employee's pre-existing illness or injury. Likewise, Petitioner's contention that any workplace illness or injury suffered by an injured worker over the age of 65 or suicide committed by an employee on the job would produce a common law negligence cause of action is also wrong. Again, under the rubric of *Jones* and its progeny, an injured worker can only maintain a common law action against his employer if the employee's non-compensable injury was caused by the negligence of his employer. Despite Petitioner's contention to the contrary, causes of action like the case at bar will arise on only a few occasions. As the District Court in *Ball* stated regarding cases like the case at bar, "[b]ecause of the liberal expansion and interpretation of the Workers' Compensation statute over the years so as to recognize a wide-range of 'ailments' as compensable injuries, it is doubtful that this conclusion has much of a practical effect today." *Ball*, 755 F. Supp. at 1354. Therefore, Petitioner's attempt to create panic regarding a flood of litigation is also misguided.

Because Mr. Bias' emotional injuries in the case at bar were specifically excluded from compensability under the West Virginia Workers' Compensation Act and because those injuries

were caused by the negligence of his employer, Respondent without question can maintain a common law negligence cause of action against his employer to recover his damages.

In its brief, Petitioner also addresses the viability of the merits of Respondents' emotional distress claim. The merits of that claim, should the Court allow Respondent to proceed, is a question for jury determination and is irrelevant to the certified question at issue. However, with regard to that issue, Petitioner is incorrect that Respondent cannot maintain a cause of action for emotional distress. In order to maintain a cause of action for intentional infliction of emotional distress, Respondent is not required to show that he suffered a physical injury as a result of the mental trauma. Respondent must only show that Petitioner committed some intentional act that caused his emotional distress. *See Harless v. First Nat. Bank in Fairmont*, 289 S.E.2d 692 (W. Va. 1982). Defendant has admitted in Requests for Admission that it intentionally short circuited a slip switch, which caused the belt fire that trapped Mr. Bias and subsequently caused his severe emotional distress. Therefore, there is no question that Mr. Bias can state a *prima facie* case for intentional infliction of emotional distress. Petitioner's argument that Respondent has no cause of action is an attempt to redirect the Court's attention away from the issue at hand.

Respondent would request that this Honorable Court affirm the holding of the Boone Circuit Court and allow Respondent to maintain his cause of action against his employer in accordance with the established law of this State, which allows an employee to maintain a cause of action against his employer for non-compensable workplace injuries caused by the negligence of the employer.

**C. PRECLUDING RESPONDENT FROM MAINTAINING A CAUSE OF ACTION AGAINST HIS EMPLOYER FOR NEGLIGENTLY CAUSING HIS NON-COMPENSABLE INJURIES WOULD LEAVE RESPONDENT WITHOUT A REMEDY AND WOULD VIOLATE THE RULES OF STATUTORY CONSTRUCTION.**

Petitioner would have this Court narrowly interpret the West Virginia Workers' Compensation Act as providing absolute immunity to an employer for all work place injuries, whether compensable or not, so long as those injuries were not caused by the deliberate intention of the employer as that term is defined in *W. Va. Code* § 23-4-2(b). Such an interpretation would leave the Respondent, and others similarly situated, without any remedy whatsoever to redress his damages. Injured workers whose injuries were not compensable under the Workers' Compensation system would receive no statutory benefits and would also be precluded from maintaining any cause of action for damages against their employer, even though such injury was caused by their employer's negligence. Not only would such a narrow interpretation leave affected injured workers without a remedy, it would also violate the rules of statutory construction and the legislative intent of the statute.

This Court has stated that:

[W]here 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.

...

Therefore, we are of the opinion that it was the legislative intent, as expressed in our compensation law to exempt employers from liability at common law or by statute for compensable injury or death of employees, however occurring, but not to exempt from liability for non-compensable disease (caused by negligence of the employer) or death resulting from such disease.

*Jones*, 168 S.E. at 487 (internal citations omitted) (emphasis added). In the case bar, should the Court accept and adopt Petitioner's argument, it would be accepting a statutory construction of the West Virginia Workers' Compensation Act that is destructive of an employee's personal right to redress his damages by common law suit against his employer. Employees would be left without a remedy when such employee suffers a non-compensable injury at the hands of their negligent employer. By denying an employee such a cause of action in these limited circumstances "a wrong could be inflicted for which no remedy would lie, a circumstance that 'is contrary to the traditional policy of the common law.'" *Farley v. Sartin*, 466 S.E.2d 522, 532 (W. Va. 1995) (citing *Baldwin v. Butcher*, 184 S.E.2d 428, 435 (W. Va. 1971)). Clearly, this Court has already determined that the legislature never intended to leave an employee without any remedy when they suffer a non-compensable workplace injury.


Despite Petitioner's argument to the contrary, for many years West Virginia, and many other jurisdictions, have interpreted the exclusivity portions of their statutes to grant immunity from suit only where there is a compensable workplace injury and have recognized a private right of action in favor of the employee against an employer for non-compensable workplace injuries caused by the employer's negligence. See Annotation, *Workmen's Compensation Act as Exclusive Remedy by Action Against Employer for Injury or Disease Not Compensable Under Act*, 100 A.L.R. 519 and 121 A.L.R. 1143 (1939), WL 121 A.L.R. 1143 (Cumulative Supplement, June 2004). As a result, Respondent respectfully requests that the Court affirm the holding of the Circuit Court and allow Respondent the cause of action to which he is currently entitled to at law.

#### IV. CONCLUSION

As stated above, contrary to Petitioner's argument, this Court has already recognized the right of an injured employee to maintain a common law action against his employer for non-compensable workplace injuries negligently caused by such employer despite the immunity afforded by the West Virginia Workers' Compensation statute. Because Respondent's injuries, in the case at bar, have been legislatively ruled non-compensable, he also should be afforded the right to bring a common law negligence action against his employer in an attempt to redress these injuries. To disallow such right of action would leave Respondent without any remedy for his damages and would be in contravention of the policy of the common law and the legislative intent of our Worker's Compensation Act. Despite Petitioner's argument, causes of action similar to Respondent's would not create a flood of litigation because most workplace injuries are already compensable under the West Virginia Compensation Act. Furthermore, it makes perfect sense that a negligent employer should only enjoy the benefit of workers' compensation immunity when an injured employee is compensated for his damage through that system. Our Workers' Compensation system was not designed to provide the employer with blanket immunity without giving the injured worker something in return. Therefore, Respondent respectfully requests that this Court affirm the ruling of the Circuit Court and allow Respondent to maintain a common law cause of action against his employer for causing his injuries that are not otherwise compensable under the West Virginia Workers' Compensation Act.

**BERCHIE EUGENE BIAS and  
PATRICIA CAROL BIAS,  
Plaintiffs,**

By Counsel




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**CERTIFICATE OF SERVICE**

This is to hereby certify that on this the 26<sup>th</sup> day of August, 2005, the undersigned have served a true and exact copy of the foregoing **“RESPONDENT’S BRIEF IN SUPPORT OF CERTIFIED QUESTION”** via United States Mail, postage properly paid, upon the following:

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